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No. 0

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHALE CALLAHAN,

Petitioner,

v.

STEVEN M. FERMON AND DIANE CARPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), this Court concluded that the First Amendment does not protect a government employee from discipline when speech is made pursuant to his "official duties." Given that the parties in *Garcetti* had agreed that the employee spoke pursuant to his official job duties, this Court had no occasion to outline: "a comprehensive framework for defining the scope of an employee's duties in case there is room for serious debate." *Id.* at 1961.

The lower courts seem to all agree that *Garcetti* has fundamentally altered the landscape of First Amendment law. They have, however, struggled when analyzing whether an employee's speech has been made pursuant to his job duties. This has given rise to splits between the Circuits and inconsistent outcomes. The petitioner is asking this Court to consider this case to resolve these inconsistencies. He presents the following questions for review:

1. In reasonably disputed cases, is the question of whether the speech of an employee is made pursuant to his employment duties a pure question of law or is it a mixed question of law and fact that should be considered by a finder of fact?

2. What are the proper criteria to consider when analyzing whether speech is made pursuant to an employee's "official duties"?

QUESTIONS PRESENTED – Continued

3. When a governmental employer has a standard policy suggesting that an employee should report wrongdoing, is an employee necessarily acting pursuant to his job duties when he reports the criminal wrongdoing of a supervisor to an independent entity?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit reversing judgment for Petitioner is reported at 526 F.3d 1040. App.1-11. The Seventh Circuit's July 15, 2008 order denying rehearing en banc is unreported. App.28. The opinion of the District Court (C.D.Ill.) denying the substantive post-trial motions is likewise unreported. App.12-25.

STATEMENT OF JURISDICTION

The Seventh Circuit entered its judgment on May 20, 2008, and denied a timely petition for rehearing en banc on July 15, 2008. On October 6, 2008, Justice Stevens granted Petitioners' application for a 45-day extension of time to file a petition for writ of certiorari which extended the deadline to file this petition to November 27, 2008. App.29. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the

> free exercise thereof; or abridging the freedom of speech . . .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

INTRODUCTION

In *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), this Court concluded that the First Amendment does not protect a government employee from discipline when speech is made pursuant to his "official duties." The employee, an assistant district attorney working as a calendar deputy, prepared as a part of his job a disposition memorandum recommending the dismissal of a case. In so doing, he was performing his proscribed duties of making recommendations on the prosecution of cases. In the wake of that event, he was transferred to a less desirable job. He claimed that the expressions in that memorandum were entitled to First Amendment protection. This Court disagreed because "his expressions were made

pursuant to his duties as a calendar deputy." *Id.* at 1951-60. According to the Court, the fact that he "spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with the pending case – distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline." The significant point, according to the Court, was that the memo was written pursuant to his official duties and restricting speech which owes its existence to a public employee's professional responsibilities does not infringe any liberties he might have enjoyed as a private citizen. *Id.* at 1960.

In *Garcetti*, both parties conceded that Ceballos' speech was made "pursuant to his job duties." Accordingly, this Court concluded that it had no occasion to formulate "a comprehensive framework for defining the scope of an employee's duties in case there is room for serious debate." *Id.* at 1961. It made clear, however, that its holding was limited to situations in which the speech arose out of the normal professional responsibilities performed by an employee and rejected the notion that an employer could restrict an employee's rights of expression by creating an excessively broad definition of his official duties. Instead, the Court explained that the question of whether someone was speaking pursuant to his professional duties involved a practical inquiry based upon "the duties an employee actually is expected to perform." *Id.* at 1962.

The lack of a comprehensive standard has, by their own admission, created confusion amongst the lower courts[1] and has resulted in inconsistent

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[1] For example, the Northern District of New York has written, that "[a]s comprehensive as *Garcetti* is, [lower courts] are still left without a standard or guide to help [them] balance or maneuver through those public statements that may be mixed, or rather disguised, because the scope of job responsibilities are not so manifest." *Jackson v. Jimino*, 2007 WL 189311, at *16 (N.D.N.Y.2007); *see also Casey v. West Las Vegas Independent School District*, 473 F.3d 1323, 1328, n. 5 (10th Cir. 2007) (noting that "[b]esides encouraging lower courts to view the facts from a "practical" perspective, the Court declined to provide guidance on how we are to go about determining the appropriate scope of an employee's official duties."); *Davis v. McKinney*, 518 F.3d 304, 311 (5th Cir. 2008) (noting that "*Garcetti* changed this analysis in ways not yet fully determined."); *Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007) (explaining that Garcetti "did not explicate what it means to speak pursuant to one's 'official duties.'"); *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F.Supp.2d 377, 382 (E.D.N.Y.2007) (stating that "[t]he question of whether an employee speaks pursuant to his official duties is not always easy and *Garcetti* sets forth no dispositive test."); *Sarsfield v. County of San Benito*, 2007 WL 3342726, *5 (N.D.Cal.2007) (explaining that "[t]his issue cannot be resolved easily at the pleading stage because *Garcetti* provides little concrete guidance as to what does and does not constitute an employee's official duties."); *Gilmartin v. City of Tucson*, 2007 WL 5320297, *3 (D.Ariz.2007) (noting that the "[d]efendants correctly assert that the decisions cited from courts 'grappling with application of *Garcetti* to their particular cases . . . simply demonstrate that there is no 'bright line' rule that the courts can use for guidance in determining when a public employee or contractor ceases to be within the scope of duties for First Amendment protection purposes.'") *Winder v. Erste*, 511 F.Supp.2d 160, 172 (D.D.C.2007) (indicating that "*Garcetti* provides limited guidance on what it means to speak 'pursuant to' one's 'official duties,' in contrast to speaking as a citizen, . . . ");

(Continued on following page)

decisions and inconsistent applications of the principles espoused by this Court in *Garcetti*. Certiorari is necessary for this Court to clarify the appropriate standards the lower courts should rely upon in determining "the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 1961.

STATEMENT OF THE CASE

A. Proceedings in the Lower Courts

The complaint in this case raised a federal question under 42 U.S.C. § 1983. Accordingly, the District Court had jurisdiction under 28 U.S.C. § 1331. On April 29, 2005, after a nearly two-week trial, a jury in Urbana, Illinois found that Diane Carper and Steven Fermon violated Petitioner Michale Callahan's rights under the First Amendment. The jury entered a verdict in favor of Callahan as to his claims against Carper and Fermon and awarded him $210,000 in compensatory damages and $276,700 in punitive

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Dennis v. Putnam County School District, 2007 WL 891517, *4 (M.D.Ga.2007) (noting that "[b]ecause the parties in *Garcetti* agreed that the employee's speech was made pursuant to the employee's employment duties, the opinion provides little guidance as to what criteria a court should consider when determining the scope of an employee's duties."); *Walters v. County of Maricopa, Arizona*, 2006 WL 2456173, *14 (D.Ariz.2006) (holding that "[u]nfortunately, the Court in *Garcetti* provided little guidance about how an employee's job duties are to be defined, . . . ").

damages against Fermon and $195,600 in punitive damages against Carper.

Carper and Fermon filed a series of post-trial motions and ultimately, on October 12, 2005, the District Court affirmed the verdict, affirmed the compensatory damages and ordered a remittitur on the punitive damages in the amount of $100,000 against Fermon and $50,000 against Carper. App.12-27.

Carper and Fermon filed a timely notice of appeal seeking review in the United States Court of Appeals for the Seventh Circuit. On May 20, 2008, the Seventh Circuit, relying upon this Court's holding in *Garcetti*, held that Callahan's speech was not entitled to protection under the First Amendment. App.1-11.

B. Facts Material to Consideration of the Questions

On July 6, 1986, Dyke and Karen Rhoads were brutally murdered in their home in Paris, Illinois. In a hasty prosecution, Gordon "Randy" Steidl and Herbert Whitlock were convicted by an Edgar County jury of their murders in June of 1987.

In 2000, the national news media began questioning the guilt of both Steidl and Whitlock. Callahan, a lieutenant with the Illinois State Police ["ISP"] was tasked by the then Director of the Illinois State Police with reviewing the old Rhoads case file.

Callahan was initially advised by other investigators that he could essentially give the case a rubber stamp because "they had the right people in jail."

After reviewing the case file and speaking with private investigators, Callahan found that he had more questions than answers. In his initial review, he located a recantation of the primary witness against Steidl and Whitlock, Darrell Herrington. The recantation acknowledged that Herrington had not been truthful during his trial testimony. It also established that Herington had been paid $50,000 from Robert Morgan, a prominent local businessman, in exchange for not discussing the fact that Morgan had been at the crime scene. The recantation had never been turned over to the defense.

Callahan also located a polygraph examination of Herrington. The polygraph had never been turned over to Steidl's defense. The polygraph was critical because it showed that Herrington had "purposely misled the police." Callahan then contacted the original investigator to inquire why the polygraph had not been disclosed and was told that the prosecutor "didn't want any negative reports that would hurt the case."

Callahan contacted seasoned homicide investigator Greg Dixon and asked him to look over the information he had acquired. Dixon did so and concluded that there were a number of problems associated with the prosecutions and convictions of Steidl and Whitlock. Callahan then wrote a memo to

his immediate supervisor, Captain John Strohl, explaining his concerns.

On May 18, 2000, Callahan and Strohl were called to Springfield to discuss his memo on the Rhoads matter with Col. Andre Parker, Carper, Edie Casella and others. During that meeting, Callahan fully explained the findings of his initial investigation. In this respect, he indicated that he had concerns that (1) Steidl and Whitlock had been wrongfully convicted; (2) there was evidence linking a prominent local businessman, Robert Morgan, to the Rhoads homicides; (3) that Morgan was linked to several other serious criminal activities; and (4) that the rights of Steidl and Whitlock had been blatantly violated during their trial. Callahan requested that the ISP re-open the Rhoads investigation. Initially, Col. Parker and the others were very enthused about the case and fully supported an investigation. In fact, Col. Parker indicated that it sounded like a made-for-TV movie.

As the meeting was ending Callahan indicated that the Illinois Attorney General had recused himself from any further proceedings in the criminal matter. Col. Parker inquired as to why this had occurred and Callahan stated that Robert Morgan was a financial contributor to Ryan's campaign. Col. Parker got a concerned look on his face and asked "not George Ryan," the Illinois Governor, and Callahan explained that no, he was referring to the Attorney General, Jim Ryan.

As the meeting closed, all participants were very enthusiastic about going forward with the case.

After the meeting ended, Callahan, recalling Col. Parker's question about George Ryan, looked to see if Robert Morgan was also a financial contributor to George Ryan. Callahan found that Morgan was a very significant financial contributor to Governor Ryan's campaign and had donated tens of thousands of dollars to his campaign committee. On Friday, May 19, 2000, Callahan reported this information directly to Carper. Carper, at the time, was a Lt. Colonel with the ISP and was responsible for the operational command of one-third of the State of Illinois.

The week of May 22, 2000, Callahan and Captain Strohl were called to meet with Carper. At trial, both Callahan and Captain Strohl explained that Carper told them that the Rhoads homicide was "too politically sensitive" and they could not look any further at the matter.

In early 2001, there was a reorganization and Major Edie Casella became Callahan's new boss. When Major Casella took over, she was briefed on the Rhoads matter and on Robert Morgan and was advised that Carper had said they were not permitted to look into the homicide. In utter disbelief, she contacted Carper to address the issue. Based upon her review, Major Casella strongly supported reopening the case and requested a meeting with Carper to discuss the issue. On April 4, 2001, Major Casella, Callahan, Sgt. Dixon and Dan Reed met with Carper

to discuss re-opening the Rhoads homicide and pursuing Morgan in that and other criminal matters. During the meeting, Carper again told the investigators that the case was "too politically sensitive" and could not be looked at.

During the meeting, Callahan told Carper that he had contacts in Paris who would contact him from time to time to discuss the Rhoads homicide. According to Casella, Carper responded to this by telling them that if they received any information about the Rhoads homicide they would need to immediately bring that information directly to her attention.

In August of 2001, Casella decided she wanted to make another request to look at the Rhoads' homicide. As such, she ordered an intelligence assessment of the case. The "Rhoads Homicide Assessment" was completed by ISP analyst Tim Farney on October 10, 2001. The independent assessment concluded that "it would have been almost impossible for Steidl and Whitlock to have committed these murders." Casella again wanted to have the case re-opened.

Casella forwarded this October 10, 2001 report to Carper and was relieved of her duties on October 24, 2001. Casella was replaced by Captain Steven Fermon. Shortly after Fermon's arrival, Callahan and Dixon briefed him, along with many other topics, on the Rhoads homicides and Bob Morgan. Fermon had no interest in pursuing these matters. Fermon told Callahan to focus strictly on his narcotics task forces

and thereafter nothing happened on these issues until January, 2003.

On Wednesday, January 8, 2003, Callahan, while off duty, received a late night telephone call at his home from Illinois Deputy Governor Matt Bettenhausen. Bettenhausen advised Callahan that Governor Ryan was considering clemency for Steidl and Whitlock and wanted to know whether they were innocent or guilty. Callahan told Bettenhausen that he would need to speak to ISP and he called Fermon. Ultimately, Callahan was asked to attend a meeting in Springfield the next day where the possibility of clemency for Steidl and Whitlock was discussed. During the meeting, Callahan expressed his opinions that Steidl and Whitlock were not guilty. At the time of the meeting, Callahan had not even looked at the Rhoads homicide for more than one year.

Steidl and Whitlock were not granted clemency.

At the meeting, the ISP Deputy Director responsible for statewide operations, Charles Brueggemann, indicated that he believed that the Rhoads homicide and Bob Morgan should be the subject of a thorough investigation. He gave Callahan the green light to investigate. Illinois inaugurated a new Governor that month and Callahan believed that the political issues would no longer be an impediment to an investigation.

Based upon Brueggemann's statements at the meeting, Callahan began putting together a task force to target Morgan. Callahan initially contacted

Assistant United States Attorney Tim Bass and then the IRS, the DEA, ATF, Illinois Department of Insurance and the Indiana State Police.

Callahan and Dixon began having concerns that Fermon was impeding an investigation into the Rhoads homicide and Bob Morgan. There were many strange occurrences and Fermon had made many peculiar comments. Callahan was good friends with FBI agent Nate Williams. Callahan met privately with Williams to discuss the impediments that had made it extremely difficult to engage in any meaningful investigation. At trial, Williams explained the conversation and stated that he and Callahan spoke as friends and that he shared his concerns. Williams, an independent federal investigator, recommended that Callahan speak with the Division of Internal Investigations ["DII"] about his concerns.

DII is, by Illinois statute, an independent body that is tasked with investigating allegations of wrongdoing by all Illinois employees under the jurisdiction of the Governor. DII is mandated to investigate allegations of wrongdoing made by any citizen. The stated protocol for an ISP employee to bring a matter to DII's attention was to take the matter up the chain of command. Callahan did not go through his chain of command but contacted DII directly.

On April 22, 2003, Callahan placed a telephone call to the Deputy Director of DII, Harold Nelson. During this conversation, Callahan told Nelson about the concerns he had with Fermon and Nelson

concluded that these allegations against Fermon were very serious.

On May 8, 2003, Callahan met with representatives of DII. During this meeting, he, in more detail than the April 22nd call, outlined his many concerns he had with Fermon. Callahan also provided DII with a written memorandum he had prepared which explained: (1) the concerns he had with Fermon; and (2) the fact that Carper had repeatedly stated that the Rhoads homicide was "too politically sensitive" and therefore could not be investigated.

Illinois State Police policy provides that all complaints are to be thoroughly investigated "to establish facts which can absolve the innocent and identify the guilty." At trial, the top DII representatives all acknowledged that Callahan's allegations were quite serious. Nonetheless, in blatant disregard of their policies, DII refused to investigate the allegations against Carper and Fermon.

Carper and Fermon, again contrary to DII policy, were notified of Callahan's complaints against them. Callahan was then removed from his prestigious role in narcotics investigations and placed in patrol on June 16, 2003.

When Callahan was removed from investigations, Carper and Brueggemann assigned another ISP officer, Ken Kaupas, to specifically look at the Rhoads matter. The choice of Ken Kaupas was curious because he had been previously disciplined and suspended by the ISP for misconduct in a federal

investigation and lying. Second, he did not live in the geographic area. Rather, he lived nearly three hours away and commuted back and forth. His hotel, per diem and gas were all paid for by the ISP.

Despite the significant evidence showing that Steidl and Whitlock could not possibly have committed the murders, Kaupas apparently was determined to establish otherwise. At trial, both the brother and sister of Dyke Rhoads testified. According to their testimony, Kaupas' intentions were to make sure that Steidl and Whitlock remained in prison. According to Dyke Rhoads' sister, when she met with Mr. Kaupas he told her that "he [Steidl] was guilty and we needed to make sure they could get him back in prison and to keep Herbie Whitlock where he was." Similarly, Dyke Rhoads' brother testified that when he met with Mr. Kaupas that he told him that he wanted to make sure that these "two scumbags" [Steidl and Whitlock] "don't get away with this."

On June 17, 2003, the United States District Court granted Steidl's *habeas* petition. *Steidl v. Walls*, 267 F.Supp.2d 914 (C.D.Ill.2003). The Court concluded that there were multiple problems including the fact that there were significant credibility issues regarding the eyewitnesses. *Id.* at 935-36.

REASONS FOR GRANTING THE WRIT

It is clear that the *Garcetti* decision has significantly altered the analysis of a governmental employee's First Amendment retaliation claim. *See*

Foraker v. Chaffinch, 501 F.3d 231, 241 (3rd Cir. 2007) (holding that "[t]he result required by *Garcetti* illustrates how that opinion narrowed the Court's jurisprudence in the area of employee speech."); *see also Davis v. McKinney*, 518 F.3d 304, 311 (5th Cir. 2008) (noting that "*Garcetti* changed this analysis in ways not yet fully determined.")[2]

Prior to *Garcetti*, when analyzing claims of First Amendment retaliation, the circuit and district courts traditionally relied upon the familiar two-part *Connick-Pickering* balancing test. The first prong, or *Pickering* prong, asks whether the speech at issue touches upon a matter of public concern. *See Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The second prong of the test, or *Connick* prong, holds that even if a governmental employee's speech touches upon a matter of public concern, the governmental employer can restrict that speech "if it can prove that the interest of the employee as a citizen in commenting on the matter is outweighed by the interest of the government employer in promoting effective and efficient public

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[2] It is not, however, altogether clear that this was the intended consequence of this Court. In *Garcetti*, this Court points out that the decision is a mere extension of its previous decisions in this area by citing, with approval, to *Pickering*; *Connick*; *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); and *San Diego v. Roe*, 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004).

service." *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983).

The circuit courts have almost all recognized that *Garcetti* added a new threshold to be met by a plaintiff prior to proceeding to the traditional *Connick-Pickering* analysis. The Seventh Circuit, for example, has held that prior to turning to the *Connick-Pickering* analysis, the Court must first determine whether the speech was made pursuant to employment duties. *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir. 2008) (holding that "[u]nder *Garcetti*, the question whether speech is about a matter of public concern does not come into play unless the court first finds that the speech was made as a citizen rather than as an employee doing her job."). *Accord Curran v. Cousins*, 509 F.3d 36, 44-45 (1st Cir. 2007); *Reuland v. Hynes*, 460 F.3d 409, 415 n. 5 (2nd Cir. 2006); *Bevis v. Bethune*, 232 Fed.Appx. 212, 215 (4th Cir. 2007); *Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 2008); *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 180 (6th Cir. 2008); *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 655 (8th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1202-03 (10th Cir. 2007); *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007).

While uniformly agreeing that *Garcetti* significantly impacts First Amendment jurisprudence, the circuit and district courts have diverged when it comes to the proper analysis to be utilized when assessing whether speech is made pursuant to job duties. The differing analyses has created significant

splits in the circuits and has resulted in inconsistent determinations.

This Court should grant certiorari to resolve these conflicts and to insure that the *Garcetti* holding is uniformly applied to all cases.

I. The Seventh Circuit, in conflict with several other circuits and several district courts, has concluded that the question of whether an employee is speaking pursuant to his job duties is purely a question of law.

In *Connick*, 461 U.S. at 148 n. 7, this Court explained that the question of whether speech was protected by the First Amendment was "one of law, not fact." As a result, the question of whether the nature of an employee's speech is entitled to constitutional protection has traditionally been considered a question of law. Relying upon *Connick*, the Seventh Circuit has concluded that the threshold question of whether an employee's speech is made pursuant to his job duties is likewise a question of law for the Court to decide. *Spiegla v. Hull*, 481 F.3d 961, 965 (7th Cir. 2007); *Callahan*, 526 F.3d at 1044. App.9.[3]

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[3] The Ninth Circuit incorrectly concluded that the Seventh Circuit had adopted the mixed question approach. It relied upon dicta from the Seventh Circuit decision in *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir. 2008), that stated "no rational trier of fact could find" that the employee's speech had been made in the

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The approach adopted by the Seventh Circuit is in contrast to the approach taken by several other courts. Recently, the Ninth Circuit explained the existence of this circuit split. *Posey v. Lake Pend Oreille School District No. 84*, ___ F.3d ___ (9th Cir. 2008).

Like the Seventh Circuit, the First, Fifth, Tenth and District of Columbia Circuits have concluded that the question is purely legal.[4] In *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1202-03 (10th Cir. 2007), the Tenth Circuit explained that *Garcetti* expanded the four prong First Amendment analysis to five prongs with the first prong addressing the threshold *Garcetti* question. The Court explained that this first step was a question of law to be resolved by the court and not by a finder of fact. *See also Hesse v. Town of Jackson, Wyoming*, 541 F.3d

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capacity of a private citizen. In this case, the Seventh Circuit held that "[w]e review de novo whether Mr. Callahan's statements qualify for protection under the standard articulated in *Garcetti*." 526 F.3d at 1044. App.8. This Court has held that pure questions of law are to be reviewed de novo, however, pursuant to Federal Rule of Civil Procedure 52(a)(6), questions that have a factual component are to be reviewed under a clearly erroneous standard. *Thornburg v. Gingles*, 478 U.S. 30, 78, 106 S.Ct. 2752, 2781 (1986).

[4] In an unpublished decision, the Eleventh Circuit has agreed with this approach. *Schuster v. Henry County, Georgia*, 281 Fed.Appx. 868 (11th Cir. 2008) (holding that "whether the subject speech was made by the public employee speaking as a citizen or as part of the employee's job responsibilities is a question of law that the court decides.").

1240, 1249 (10th Cir. 2008) (holding that "[t]he determination of whether a public employee speaks pursuant to official duties is a matter of law.").

In *Charles v. Grief*, 522 F.3d 508, 513 (5th Cir. 2008), the Fifth Circuit made the following conclusion:

> The magistrate judge commented in his report and recommendation that the question whether Charles's statements were made in his capacity as a concerned citizen or as a Commission employee is "a material fact properly resolved at trial." On further reflection, we acknowledge that, even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles's speech is entitled to protection is a legal conclusion properly decided at summary judgment. *Charles*, 522 F.3d at 513, n. 17.

In *Curran v. Cousins*, 509 F.3d 36, 44 (1st Cir. 2007), the First Circuit explained that post-*Garcetti* there are two steps to an employee First Amendment retaliation claim. The Court concluded that both, including the *Garcetti* question, were questions of law for a court to decide. Similarly, in *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007), the D.C. Circuit concluded that this was a question of law.

Other jurisdictions, while recognizing that ultimately the question of whether speech is constitutionally protected is a question of law, have

recognized that there are factual components that should be resolved by the trial court. These "mixed question" jurisdictions appear to include the Third, Eighth and Ninth Circuits.

The Third Circuit, in *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3rd Cir. 2007), was the first to recognize that the question is not purely one of law: "[u]nlike the question of whether speech is protected by the First Amendment, the question of whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law." *See also Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3rd Cir. 2008).

In *Posey*, the Ninth Circuit concluded that this question involved "ordinary principles of logic and common sense." *Id.* Relying upon *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 n. 17, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), the Court held that applying these principles to a particular set of circumstances has "ordinarily been entrusted to the finder of fact."

In analyzing First Amendment claims prior to *Garcetti*, the Eighth Circuit had concluded that "any underlying factual disputes concerning whether the speech at issue [is] protected should [be] submitted to the jury." *Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993) (*citing Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993)). Post-*Garcetti*, the district courts in the Eighth Circuit would appear to agree that this is a question of fact. For example, in

Livingston v. Bartis, 2008 WL 185791, *8 (E.D.Mo.2008), the District Court found that there was "a genuine issue of material facts" as to whether the plaintiffs "were acting as private citizens, rather than public employees."

While the Second Circuit does not appear to have specifically weighed in on this issue, several of the lower courts in that Circuit have addressed the question. In *Caruso v. Massapequa Union Free School Dist.*, 478 F.Supp.2d 377, 382-83 (E.D.N.Y.2007), the district court noted that "[i]t is clear, however, that application of *Garcetti* requires a fact-specific inquiry." *See also Jackson v. Jimino*, 2007 WL 189311, at *16 (N.D.N.Y.2007) (finding that material issues of fact existed in determining whether the plaintiff was speaking pursuant to his official job duties).

The Seventh Circuit's analysis of this issue squarely conflicts with the analysis of at least three other circuits on this important question, necessitating review by this Court.[5] The approach of the Seventh Circuit unfortunately ignores the dictates of this Court that the analysis of whether speech is made pursuant to employment duties is a practical one. The "practical" approach recognizes the important role of both the trial judge and jury. In *Garcetti*, this Court

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[5] It is worthy of noting that the circuits are also split on the question of whether the balancing inquiry is an issue of law or fact. *See Weaver v. Chavez*, 458 F.3d 1096, 1101 (10th Cir. 2006) (recognizing the circuit split).

strongly cautioned that an employer cannot simply create broad job descriptions to defeat First Amendment claims. *Garcetti*, 126 S.Ct. at 1961 ("We reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions.").[6]

An assessment of whether a job description embellishes an employee's responsibilities is a question properly determined by a jury and/or a trial judge and not by a reviewing court by reviewing a cold record.[7] Given that the post-trial motions in this

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[6] The underlying decision of the District Court, App.12-25, was written before this Court's decision in *Garcetti*. The Seventh Circuit should have remanded the matter back to the District Court to make specific factual findings addressing the issue of whether Callahan's speech was made pursuant to his employment duties.

[7] A trial court is also most capable of assessing whether written job duties correlate with the true expectations of an employer. *See Paola v. Spada*, 498 F.Supp.2d 502, 508 (Conn.2007) (indicating that "[t]he Court will also look to whether the written rules or job duties differ from actual performance of the job as condoned by the employer or from employer expectations to job duties."). The well-documented police "code of silence" suggests that while there might be written rules mandating that a police officer come forward with wrongdoing, those rules are not necessarily meant to be followed. *See* David Weisburd et al., *Police Attitudes Towards Abuse of Authority: Findings from a National Study, Nat'l Inst. Of Justice Research in Brief* (U.S. Dept. of Justice Office of Justice Programs, Washington, D.C.), May 2000, at 1; *Report of the Independent Commission on the Los Angeles Police Department*, 170 (1991); *see also Ariza v. City of New York*, 1996 WL 118535 (E.D.N.Y.1996) at *5 (discussing the existence and

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case were decided before *Garcetti*, the Seventh Circuit should have remanded the case back to the District Court to make a factual finding of whether Callahan was speaking pursuant to his employment duties.[8] Under Supreme Court Rule 10(a), this Court should grant review to resolve this important conflict.

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consequences of such a code of silence); *McLine by and Through Harvey v. City of Chicago*, 742 F.Supp. 994, 1001-03 (N.D.Ill.1990) (discussing the code of silence); Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 270 n. 15 (1998); Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1346-47 (1996) (stating that police perjury in major United States cities "is a national problem and has been for decades."). As such, the realistic and practical expectations of an employer could be that allegations of wrongdoing not be brought forward. In such a situation, an employee would not be acting pursuant to his "practical" employment duties in coming forward with wrongdoing. This question is highly fact dependent and should be decided at the district court level.

[8] The Seventh Circuit implicitly acknowledged that there were likely disputed questions of fact on this issue. For example, the Court found that Callahan engaged in a "surreptitious investigation of Cpt. Fermon." App.4. The Court held that this unauthorized investigation led Callahan to make his report to DII. If Callahan engaged in an unauthorized and improper investigation, it is difficult to understand how a report on that investigation would be made pursuant to his employment duties.

II. The lower courts have analyzed a generalized employment policy requiring an employee to report misconduct differently. As a result, inconsistent rulings have come out of different courts around the country.

It is hard to imagine that there are many governmental employers who do not have some type of a policy that requires an employee to report misconduct on the part of his fellow employees. The circuit and district courts have disagreed on the impact that such a policy has on the *Garcetti* analysis. Illustrative of this divergence are the rulings in *Taylor v. Freetown*, 479 F.Supp.2d 227, 237 (D.Mass.2007), and *Weintraub v. Board of Educ. of City of New York*, 489 F.Supp.2d 209, 219 (E.D.N.Y.2007).

In *Taylor*, the District Court of Massachusetts wrote:

> *Garcetti* is not meant to strip an employee of First Amendment protection when speaking out regarding issues of serious and widespread public concern, like corruption, just because a garden-variety rule requires him to tell a supervisor. 479 F.Supp.2d at 237.

Conversely, in *Weintraub*, the District Court for the Eastern District of New York found that:

> [t]he general principle running through these and other cases applying *Garcetti* to similar situations is that, when a public employee airs a complaint or grievance, or expresses concern about misconduct, to his or her immediate supervisor or pursuant to a

> clear duty to report imposed by law or employer policy, he or she is speaking as an employee and not as a citizen; in such cases, the First Amendment does not protect the employee's speech from discipline or retaliation by the employer. 489 F.Supp.2d at 219.

ISP Directive PER-030, which governs the obligation of an employee to come forward with allegations of misconduct, applied to Callahan. The directive, in relevant part, states:

> When misconduct is observed or complaints/ information about misconduct are received by any employee, such employee will immediately notify his/her supervisor and prepare a written report to be forwarded through the chain of command containing the information received, observations, and/or action taken.

Callahan, of course, did none of these things. He did not make the report in a timely manner; he did not report it to his supervisor and no report was forwarded through his chain of command.

The first requirement of this directive requires the report be made "immediately." As was noted by Carper and Fermon, Callahan's first reports to DII occurred "over two years later." Carper made the statements "too politically sensitive" over a two year period of time. Fermon had been engaging in his conduct for a long period of time as well.

The second and third requirements of PER-030 required Callahan to report the incidents to his supervisor and through his "chain of command." The trial record is replete with references to the importance of following ISP's "chain of command."

Rather than taking his concerns to his chain of command, Callahan addressed his concerns to two independent entities, the FBI and the Division of Internal Investigations. DII was created by Illinois statute and Illinois law further makes it quite clear that DII has the responsibility for investigating not only the ISP but all "employees under the jurisdiction of the Governor." *See* 20 ILCS 2605/2605-50. Not only is DII's jurisdiction not limited to the ISP, but the majority of its investigations do not deal with the ISP. At trial, ISP Director testified:

> . . . there are a large number [DII Investigations] and the majority of them don't even apply to the Illinois State Police. They apply to other state employees because it's not – the Division of Internal Investigation doesn't just investigate the State Police. They investigate other state employees. So the majority of them are other offices.[9]

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[9] The range of issues investigated by DII is quite broad as well. DII Deputy Director Nelson testified that "[i]t's very broad as far as the types and kinds of investigations that we conduct" [Tr. 548]. He indicated that DII is responsible not only for investigating policy violations but also for investigating criminal charges against governmental actors employed by the State of Illinois [Tr. 550].

Seizing on PER-030, the Seventh Circuit concluded that, under *Garcetti*, the fact that the ISP "require[d] all ISP officers to report misconduct of fellow employees to the DII," meant that Callahan's speech simply was not entitled to protection under the First Amendment. App.8-9. *See also Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007); *E.g. Battle v. Bd. of Regents*, 468 F.3d 755, 761 (11th Cir. 2006) (University employee's internal report which alleged improprieties in her supervisor's handling of federal financial aid funds was made pursuant to her official employment responsibilities as a financial aid counselor.).

Given that DII is tasked with the responsibility of investigating misconduct and/or criminal activity on the part of all state employees, it is impossible to meaningfully distinguish this decision from decisions of other Circuits.

In *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006), the plaintiff complained to the California Inspector General about sexual harassment at a prison. The Court held:

> It was certainly not part of her official tasks to complain to . . . the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace. Rather, it was Freitag's responsibility *as a citizen* to expose such official malfeasance to broader scrutiny. Accordingly, in these instances, for purposes of the First

> Amendment she spoke as a citizen. [emphasis in the original]. *See also Marable v. Nitchman*, 511 F.3d 924, 932-33 (9th Cir. 2007) (rejecting generalized job duty and noting that a "practical inquiry on [plaintiff's] job duties, which we think is required by the Supreme Court's reasoning, we conclude that [plaintiff] had no official duty to ensure that his supervisors were refraining from the alleged corrupt practices.").

Similar to *Freitag*, in *Williams v. Riley*, 275 Fed.Appx. 385, 389 (5th Cir. 2008), the Fifth Circuit reversed a decision of a district court that had concluded, in language nearly identical to the language of the Seventh Circuit in *Callahan*, that "it is undisputed that part of the plaintiff's official duty description include reporting unlawful activity of other officers." *Williams v. Riley*, 481 F.Supp.2d 582, 584 (N.D.Miss.2007). The Fifth Circuit held that the mandatory reporting policy "does not establish the speech was made 'pursuant to their official duties.'" *Id.* The Court concluded its analysis by finding that "even if the Policy undisputedly imposed a duty on Plaintiffs to report the incident they witnessed, it is error to rely solely upon an employer's written policy in determining official duties." *Id.*

The decisions of the Seventh Circuit in *Callahan* and of the Eleventh Circuit in *Battle* are clearly at odds with the Ninth Circuit decision in *Freitag* and the Fifth Circuit decision in *Williams*.

Decisions from many of the district courts indicate that this same issue is going to percolate, with inconsistent rulings, throughout the federal judiciary for the foreseeable future.

In *Batt v. City of Oakland*, 2006 WL 1980401, at *4 (N.D.Cal.2006), the District Court distinguished *Garcetti*, noting "defendants' argument that plaintiff had a duty to report misconduct rests on . . . rules and regulations – materials which the *Garcetti* Court suggested are not dispositive," and finding that notwithstanding such rules and regulations, "the culture of the [Oakland Police Department] and the express commands of [plaintiff's] direct supervisors established that plaintiff had a duty not to report misconduct," and thus "a fact issue remains as to whether plaintiff's speech was protected under the First Amendment." *Accord Paola v. Spada*, 498 F.Supp.2d 502, 509 (Conn.2007) (holding that "[t]he record does not establish as a matter of law that, in carrying out his job duties as a state trooper, that he was expected as a practical matter to investigate or report all potential wrongdoing within the division."); *Drolett v. Demarco, Jr.*, 2007 WL 1851102 (D.Conn.2007) (police department rules and regulations did not establish duty as a matter of law to report problems through the chain of command); *Ventura v. Town of Manchester*, 2008 WL 4080099 (Conn.2007).

In *Walters v. County of Maricopa, Arizona*, 2006 WL 2456173, *14 (D.Ariz.2006), the Court wrote:

> Walters' whistleblowing here does not fall within the scope of employment duties that he "was employed to do," at least as those duties are regarded by the First Amendment. Walters was a police sergeant employed to investigate and assist in the prosecution of criminal drug offenders. Any attempt to inflate Walters' job description so as to include blowing the whistle on other officers would likely exceed the "practical inquiry" suggested by the Supreme Court. The Supreme Court's narrow "hold[ing] that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," *Garcetti*, 126 S.Ct. at 1960.

Conversely, the District Court in *Gattison v. Township of Irvington*, 2007 WL 4591354, *5 (D.N.J.2007), like the Seventh Circuit ruling in *Callahan*, held that a generalized policy mandating that a police officer report misconduct of fellow officers shielded his statements from First Amendment protection. Similarly, in *Springer v. City of Atlanta*, 2006 WL 2246188, *3-4 (N.D.Ga.2006), the Northern District of Georgia, concluded that an employee who complained to the Mayor of financial mismanagement was not entitled to First Amendment protection because "Georgia law 'imposes on employees a duty of loyalty, faithful service and regard for an employer's interest.'"

It is hard to imagine that there are many governmental employers operating without policies in

place that obligate an employee to report the wrongdoing of their co-workers. If they do not have such policies, they certainly are in the process of developing them, much like the now ubiquitous policies employers have adopted requiring the reporting of sexual harassment in the wake of this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998). Absent some clear direction from this Court, these policies are going to continue to present formidable hurdles for the lower courts and result in inconsistent decisions from the lower courts concerning whether an employee adhering to such a policy is acting pursuant to his job duties.

III. The circuit courts have not been successful at creating a uniform method for analyzing whether speech is made pursuant to an employment duty resulting in discrepant outcomes. This Court should grant certiorari to create a standard that will result in consistent outcomes.

As noted *supra* fn1, the lower courts have struggled to create a standard to be applied in assessing whether an employee has spoken pursuant to his job duties. *See Gilmartin v. City of Tucson*, 2007 WL 5320297, *3 (D.Ariz.2007) (noting that the "[d]efendants correctly assert that the decisions cited from courts 'grappling with application of *Garcetti* to their particular cases . . . simply demonstrate that

there is no 'bright line' rule that the courts can use for guidance in determining when a public employee or contractor ceases to be within the scope of duties for First Amendment protection purposes.'").

There have been multiple instances where remarkably similar speech has been ruled protected by one court and unprotected by another. The examples demonstrate the importance of this Court formulating a consistent standard to be applied in every case where there is a question of whether an employee is speaking pursuant to an employment duty.

A. Statements made by employees in public hearings that are related to the scope of employment

In *Lindsey v. City of Orrick, Missouri*, 491 F.3d 892, 898 (8th Cir. 2007), the Eighth Circuit analyzed a set of facts in a manner that is not consistent with the Seventh Circuit's analysis. In *Lindsey*, the plaintiff was employed by a small municipality as its public works director. *Id.* at 895. As part of his job duties, he was required to attend the City Council meetings and report about public works issues. *Id.* The City sent the plaintiff to a training seminar, at the City's expense, which included training "on Missouri's open meetings or 'sunshine' law." *Id.* at 896. When the plaintiff returned from this training, he became concerned that the City Council was violating the "sunshine" law by going into executive session. He raised this concern at least four times during

Council meetings. *Id.* He was fired and brought suit alleging First Amendment retaliation.

Before the Eighth Circuit, the defendants argued that the plaintiff's speech was not that of a citizen because he "was required to attend [Council meetings] as part of his job" and "he learned about the sunshine law at a seminar paid for by the City." *Id.* at 898. While acknowledging that the speech occurred at work, during hours plaintiff was required to be present and was made to his supervisors, the Eighth Circuit rejected this argument and held that the speech was made as a concerned public citizen and not pursuant to employment obligations. *Id.*

Conversely, in *Caraccilo v. Village of Seneca Falls, N.Y.*, ___ F.Supp.2d ___, 2008 WL 4371355, *16 (W.D.N.Y.2008), the District Court held that the plaintiff's statements in a Safety Committee public meeting, "in which plaintiff stated her belief that the Open Meetings Law required that minutes be taken, were made by plaintiff not simply as a concerned citizen, but as a Village employee who believed that it was her duty to take minutes of the meeting."

B. Compelled Testimony

Some courts have recognized that the giving of compelled testimony is generally entitled to First Amendment protection. For example, in *Reilly v. City of Atlantic City*, 532 F.3d 216 (3rd Cir. 2008), the Third Circuit held that a police officer's testimony for the prosecution at the criminal trial of a fellow officer

"constituted citizen speech" that was protected by the First Amendment, even though the speech "appear[ed] to have stemmed from [the plaintiff's] official duties. . . . " *Id.* at 231. In so ruling, the court stated that "[i]t is axiomatic that '[e]very citizen . . . owes to his society the duty of giving testimony to aid in the enforcement of the law,'" *id.* at 228 (*quoting Piemonte v. United States*, 367 U.S. 556, 559 n. 2, 81 S.Ct. 1720, 6 L.Ed.2d 1028 (1961)), and that "[t]he duty to testify has long been recognized as a basic obligation that every citizen owes his Government." *Id.* at 231 (*quoting United States v. Calandra*, 414 U.S. 338, 345, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974)). The court added that, "an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." *Id.*

Similarly, in *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007), the Seventh Circuit held that "[b]eing deposed in a civil suit pursuant to a subpoena was unquestionably not one of [the plaintiff police officer's] job duties because it was not part of what he was employed to do." *Id.* at 598. The court further held that the fact that the plaintiff "testified about speech he made pursuant to his official duties [did not] render[ ] his deposition unprotected." *Id.*

Conversely, in *Green v. Barrett*, 226 Fed.Appx. 883, 886 (11th Cir. 2007), the Eleventh Circuit reached the opposite conclusion. Relying upon both *Garcetti* and its pre-*Garcetti* decision in *Morris v. Crow*, 142 F.3d 1379, 1383 (11th Cir. 1998), the Court

noted that "if a plaintiff speaks as part of her duties as a public employee, the speech is not protected by the First Amendment" and that "[t]his distinction is not affected by the fact that the plaintiff made the statements in testimony."

There are direct parallels between the testimony in both *Reilly* and *Morales* and Callahan's statements at the January, 2008 clemency meeting.

C. Memos that relate to job duties

In *Garcetti*, this Court was faced with a situation where an employee wrote a memo that he was mandated to write as part of his job duties. In fact, it was a routine function of the duties of a calendar deputy. After *Garcetti*, several courts have had to address a situation when an employee voluntarily writes a memo addressing concerns about the workplace.

In *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1204 (10th Cir. 2007), the Tenth Circuit rejected an overly broad reading of what constituted an employment obligation. Relying upon *Garcetti*, that Court held:

> Although the record indicates that Plaintiffs were encouraged to present their views to improve the Academy and did so in the form of complaints and grievances to the Board, we cannot deem such a generalized grievance policy to be an official duty without eviscerating *Garcetti* and the general constitutional principle that "public employees do not

> surrender all their First Amendment rights by reason of their employment." *Garcetti*, 126 S.Ct. at 1957; see id. at 1961 ("We reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions.").

In *Posey v. Lake Pend Oreille School District No. 84*, ___ F.3d ___, 2008 WL 4570616 (9th Cir. 2008), the Ninth Circuit reversed a district court determination that a memo was not protected speech under *Garcetti*. In *Posey*, the plaintiff was a security officer at a local high school. He became "uneasy" because he believed that the principal was not serious enough about tackling student discipline and safety issues. He wrote a letter to the Superintendent, Chief Administrative Office and members of the board of the school district outlining his concerns. The District Court granted summary judgment finding that, pursuant to *Garcetti*, the "statements were made pursuant to his duties." *Id.* The Ninth Circuit reversed and concluded that, despite the fact that the memo dealt directly with the specifics of the plaintiff's employment, there were questions "regarding the scope and content of [plaintiff's] job responsibilities."

In *Haynes v. City of Circleville, Ohio*, 474 F.3d 357 (6th Cir. 2007), the Sixth Circuit, presented with very similar facts, reached the opposite conclusion. In *Haynes*, the plaintiff was employed by the city as a canine handler. The plaintiff became concerned about lack of training afforded to canine handlers. *Id.* at

359-360. He then wrote a memo to the police chief expressing his concerns that the failure to adequately train canine handlers would result in liability for the city. The Sixth Circuit held that "[i]n lodging his protests to Chief Gray against training cutbacks, [plaintiff] was acting as a public employee carrying out his professional responsibilities." *Id.* at 364. *See also Williams v. Dallas Independent School District*, 480 F.3d 689 (5th Cir. 2007) (*per curiam*) (foreclosing the retaliation claim of a high school athletic director who was discharged after writing a memo to his principal concerning the handling of school athletic funds).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Seventh Circuit to review the questions presented in this Petition.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

NOS. 05-4313, 05-4335, 06-1055 & 06-1098

MICHALE CALLAHAN,

Plaintiff-Appellee,

v.

STEVEN M. FERMON and
DIANE CARPER,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of Illinois.
No. 03 C 2167 – **Harold A. Baker**, *Judge*.

ARGUED JANUARY 10, 2008 – DECIDED MAY 20, 2008

Before EASTERBROOK, *Chief Judge*, and RIPPLE and ROVNER, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Michale Callahan, a former lieutenant with the Illinois State Police, was transferred after making statements at a meeting about a cold case and after making official complaints about his superior officers. In bringing this action under 42 U.S.C. § 1983 against several of his superiors, he claims that he was transferred in retaliation

for speech that is protected by the First Amendment. The jury found that two of the defendants, Diane Carper and Steven Fermon, had retaliated against him on the basis of his protected speech and awarded him compensatory and punitive damages. The defendants appealed. While this appeal was pending, the Supreme Court decided *Garcetti v. Ceballos,* 547 U.S. 410 (2006), which held that the First Amendment does not protect a public employee's statements made as part of his official duties. In light of *Garcetti,* we hold that the First Amendment does not insulate Mr. Callahan's statements from employer discipline. Accordingly, the judgment in his favor is reversed, and the case is remanded with instructions to enter judgment for the defendants.

I

BACKGROUND

A.

Michale Callahan was a lieutenant in Zone V of the Illinois State Police ("ISP"). His captain, the head of Zone V, was Steven Fermon. Cpt. Fermon reported to Diane Carper, the commander of several zones including Zone V. Mr. Callahan, Cpt. Fermon and Cdr. Carper all worked in the Department of Operations, the branch of the ISP that contains the patrol and investigative functions. A second branch of the ISP, the Department of Internal Investigation ("DII"), investigates all complaints about misconduct by governmental employees, including complaints

brought by citizens and complaints about employees not within the ISP itself.

In the spring of 2000, a private investigator sent a letter to the ISP asking it to review the 1986 murder of Dyke and Karen Rhoads. Mr. Callahan was assigned to review the matter and to take appropriate action. His examination concluded that there were significant problems with the convictions of Herbert Whitlock and Randy Steidl, the men serving life sentences for the crime.

Through his initial investigation, Mr. Callahan became suspicious that Robert Morgan, a person of interest in the initial Rhoads' investigation who never had been charged, actually might have committed the murders. At the time Mr. Callahan was reviewing the file, Morgan was under investigation by federal authorities for possible drug trafficking and money laundering. Mr. Callahan also learned that Morgan had made significant donations to the political campaigns of both the Illinois Attorney General and the Governor. After Mr. Callahan relayed this information to Cdr. Carper, she ordered him not to continue investigating the Rhoads' murder, but she told him that he could continue to investigate Morgan's possible ongoing illegal activities.

In January 2003, the Deputy Governor called Mr. Callahan at his home and explained that the Governor was considering a grant of clemency for Steidl and Whitlock. He solicited Mr. Callahan's opinion as to whether they were guilty or innocent. Mr. Callahan

said that he needed to talk to ISP before he responded. He then called Cpt. Fermon and Cdr. Carper. Cdr. Carper reported the information to her superior, who arranged a meeting at the ISP Academy for the next day in order to discuss the Governor's inquiry. At the all-day meeting, Cpt. Fermon and Mr. Callahan made presentations regarding the convictions of Steidl and Whitlock. They also discussed Morgan's possible criminal activity. Mr. Callahan stated that he thought Steidl and Whitlock were not guilty; he also provided a computer-generated assessment of the homicide that indicated that the two could not have committed the murder.

The relationship between Cpt. Fermon and Mr. Callahan always had been strained, but, in 2003, Mr. Callahan became suspicious that Cpt. Fermon was compromising deliberately the investigation of Morgan. He also began to suspect that Cpt. Fermon might have connections to organized crime. Mr. Callahan discussed his concerns with friends on the task force and former ISP officers. He also began a surreptitious investigation of Cpt. Fermon. In April 2003, Mr. Callahan lodged a complaint with the DII in which he claimed that Cpt. Fermon possibly was involved in misconduct relating to organized crime, and that he possibly had interfered with a federal criminal investigation. He also told DII that Cdr. Carper had ordered him not to pursue the Rhoads' investigation because it was too politically sensitive. Several weeks later he made a second complaint to the DII with substance almost identical to the first.

After reviewing the complaints, the DII decided to take no action on them.

The hostility between Mr. Callahan and Cpt. Fermon made Zone V a difficult workplace. Between late 2002 and April 2003, the ISP's Equal Employment Opportunity Office ("EEOO") investigated a hostile-work-environment complaint related to that stress in Zone V. Around the same time that Mr. Callahan filed his DII complaints regarding Cpt. Fermon and Cdr. Carper, the EEOO reported to ISP's upper command that the hostility between Mr. Callahan and Cpt. Fermon was sufficiently serious to warrant action. Cdr. Carper and her superiors met to discuss the problem and determined that they would recommend transferring both Cpt. Fermon and Mr. Callahan out of Zone V. On June 16, that recommendation was given effect; Mr. Callahan was transferred to the patrol lieutenant position in another district.

B.

On September 23, 2003, Mr. Callahan filed a complaint in the district court. He alleged that he had been transferred laterally because of his statements at the ISP Academy meeting and because of the complaints that he had made to the DII in April and May of 2003. At trial, a jury found in favor of Mr. Callahan as to his claims against Cdr. Carper and Cpt. Fermon and awarded him $210,000 in compensatory damages. The jury additionally awarded him $276,700 in punitive damages against Cpt. Fermon

and $195,600 in punitive damages against Cdr. Carper. The district court allowed the verdict and compensatory damages to stand, but it ordered the punitive damages reduced to $100,000 against Cpt. Fermon and $50,000 against Cdr. Carper.[1] Cpt. Fermon and Cdr. Carper appealed.

II

DISCUSSION

The First Amendment, as made applicable to the states through the Fourteenth Amendment, *see Ben's Bar, Inc. v. Village of Somerset,* 316 F.3d 702, 707 (7th Cir. 2003), protects, under certain circumstances, a public employee's right to speak as a citizen about matters of public concern. *See Garcetti,* 547 U.S. at 420-21. An employer may not retaliate against an employee for engaging in protected speech. *Massey v. Johnson,* 457 F.3d 711, 716 (7th Cir. 2006). Under the traditional pre-*Garcetti* two-step test, a public employee's speech received constitutional protection if the employee could establish that (1) he spoke as a citizen on matters of public concern, and (2) his interest as a citizen in commenting upon matters of public concern outweighed the interest of the State as an employer in promoting the efficiency of the public

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[1] Although Mr. Callahan requested that the court grant him injunctive relief that would restore him to his position in Zone V, the district court did not grant such relief, and Mr. Callahan has not brought the matter to this court by a cross appeal.

services it performs through its employees. *Sigsworth v. City of Aurora,* 487 F.3d 506, 509 (7th Cir. 2007). Applying this test, the jury determined that Mr. Callahan's speech was protected by the First Amendment.

Since the jury's decision, however, the Supreme Court has provided further guidance as to when a public employee can be considered, for First Amendment purposes, to be speaking as a citizen. In *Garcetti,* the Court held that "when public employees make statements *pursuant to their official duties,* the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421 (emphasis added). *Garcetti* was decided while this case was still open on direct review, and therefore that decision must be given effect in this case.[2] *See Spiegla v. Hull,* 481 F.3d 961, 965 (7th Cir. 2007).

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[2] Mr. Callahan contends that Cdr. Carper and Cpt. Fermon forfeited their *Garcetti* argument by failing to raise it in the district court. *See Spiegla v. Hull,* 481 F.3d 961, 964 (7th Cir. 2007). We cannot accept this argument. Cdr. Carper and Cpt. Fermon moved for summary judgment on the basis that Mr. Callahan's speech was not constitutionally protected "because the speech was a part of his routine duties." R.28 at 24-25; *see also* R.39 at 7 (rejecting the defendants' argument that "Callahan's speech was not protected because he was performing routine job duties as a police officer"). This court has held that a defendant's motion for summary judgment on a *Garcetti*-type ground "was sufficient to preserve the issue for appellate

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We review de novo whether Mr. Callahan's statements qualify for protection under the standard articulated in *Garcetti*. *See id.* After *Garcetti*, when determining whether a public employee spoke as a citizen, the operative question is whether he made his statements pursuant to his official duties. *Id.* This inquiry is a practical one. *Garcetti*, 547 U.S. at 424. Notably, the Court rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Id.* "Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.* at 424-25. Additionally, the location and audience of the employee's speech are not dispositive; speech may be protected even if it is made by an employee at his place of work to his coworkers. *Id.* at 420. Neither is the subject matter of the speech dispositive; the "First Amendment protects some expressions related to the speaker's job." *Id.* at 421. The controlling factor in the *Garcetti* inquiry is whether the speech "owes its existence to a public employee's professional responsibilities." *Id.*

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review." *Spiegla*, 481 F.3d at 964. Therefore, Cdr. Carper and Cpt. Fermon did not forfeit their *Garcetti* argument. *See id.*

With *Garcetti* in mind, we turn to Mr. Callahan's claims of First Amendment retaliation. The jury considered two instances of speech in determining that Mr. Callahan had spoken as a citizen: (1) he contended at the ISP Academy meeting that Steidl and Whitlock should be granted clemency; (2) he made two complaints about Cpt. Fermon and Cdr. Carper to the DII. We shall consider each in turn.

Based on the record as a whole, we conclude that Mr. Callahan was speaking pursuant to his official duties – not as a citizen – when he spoke at the Academy meeting. Lieutenants in the ISP routinely are required to attend meetings and to exchange information about investigations. Here, Mr. Callahan was ordered by his superiors to attend the meeting during normal business hours. At the meeting, he advised his employer about the results of his investigation, which he had been ordered to conduct as a public employee with the ISP. He did not speak as a citizen when he attended the meeting; he went to work and performed the tasks that he was paid to perform. *See Garcetti,* 547 U.S. at 422. Like the plaintiff in *Sigsworth,* Mr. Callahan's "speech was part of the tasks he was employed to perform." 487 F.3d at 511. Therefore, "he spoke not as a citizen but as a public employee, and that speech is not entitled to protection by the First Amendment." *Id.*

We also conclude that Mr. Callahan spoke pursuant to his official duties when he twice complained to the DII about Cpt. Fermon and Cdr. Carper. Mr. Callahan stated to his employer's investigative

branch his concern that Cpt. Fermon, a captain in the ISP, was involved in unlawful activity and had impeded a criminal investigation. He also alleged that Cdr. Carper had been involved in misconduct by refusing to investigate a crime for political reasons. Mr. Callahan conceded in his deposition testimony and in closing arguments at trial that the ISP rules of conduct require all ISP officers to report misconduct of fellow employees to the DII. That requirement was part of his official responsibility as a police lieutenant. *See Garcetti,* 547 U.S. at 424; *Spiegla,* 481 F.3d at 966. That Mr. Callahan's "statements highlighted potential misconduct by [ISP] officers does not change the fact that [he] was speaking pursuant to [his] official responsibilities, not as a citizen contributing to the civic discourse." *Spiegla,* 481 F.3d at 967 (quotation marks omitted) (final alteration omitted); *see also Morales v. Jones,* 494 F.3d 590, 598 (7th Cir. 2007), *cert. denied,* 128 S. Ct. 931 (2008).

Mr. Callahan did not speak as a citizen at the Academy meeting or when he filed two complaints with the DII because his statements were required by his actual duties as a lieutenant in the ISP. *Spiegla,* 481 F.3d 961; *see also Garcetti,* 547 U.S. at 424. He therefore has no claim for First Amendment retaliation under section 1983, and the judgment entered in his favor must be reversed.[3] *Spiegla,* 481 F.3d at 966.

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[3] As a result of this disposition we need not address the remainder of the appellants' arguments.

Conclusion

Accordingly, the judgment of the district court is reversed, and the case is remanded to the district court with instructions to enter judgment for the defendants. The defendants may recover their costs in this court.

REVERSED and REMANDED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

MICHALE A. CALLAHAN, Plaintiff, v. CHARLES E. BRUEGGEMANN, DIANE CARPER, AND STEPHEN M. FERMON, Defendants.	)	03-2167

ORDER ON PENDING POST TRIAL MOTIONS

(E-Filed Oct. 12, 2005)

After a two-week trial, a jury found in favor of the plaintiff, Michale A. Callahan, ("Callahan") and against the defendants, Diane Carper ("Carper") and Stephen M. Fermon ("Fermon"), awarding compensatory damages of $210,000, and assessing punitive damages of $195,600 against Carper and $276,700 against Fermon. The jury found in favor of defendant Charles E. Brueggemann ("Brueggemann").

Now before the court are the following post-trial motions: Fermon's motion for judgment as a matter of law [#101] and motion for a new trial or, in the alternative, a motion to alter or amend judgment [#103]; Carper's motion for a new trial or, in the alternative, a motion to alter or amend judgment [#104] and motion for judgment as a matter of law [#106]; Callahan's motion for attorney fees and costs [#108]; and Brueggemann's motion for a bill of costs [#117].

I.

On a motion for judgment as a matter of law, the court does not re-weigh the evidence presented or make credibility determinations. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). The court simply determines whether the evidence presented at trial was legally sufficient to support the jury's verdict. *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 924 (7th Cir. 2000).

Fermon and Carper argue for judgment as a matter of law because Callahan's speech was not protected by the First Amendment. They contend that Callahan did not speak on a matter of public concern, and the Illinois State Police's ("ISP") interests outweighed Callahan's right to speak. The parties raised the public concern argument on summary judgment; this court rejected the argument, as did the Seventh Circuit Court of Appeals when it ruled on the defendants' last-minute attempt to postpone trial. The court sees no need to revisit this issue.[1]

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[1] It seems indisputable to the court that Callahan's speech was protected by the First Amendment. Consider Justice White's observation in *Connick v. Myers*, 461 U.S. 138, 148 (1983) (public employee's speech not protected) as to what would have changed the outcome of that case. "Myers did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others."

The defendants continue to argue that Callahan's right to speak was outweighed by the ISP's interest as an employer in ending an adversarial work environment in Zone 5, citing *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). However, the defendants presented no evidence that Callahan's protected speech caused the adversarial work environment. The defendants argued that an EEO investigation motivated their decision to transfer Callahan. But ISP officials were told they could not rely on the results of the investigation because the investigation was ongoing. Furthermore, the EEO investigation results were not reduced to writing until several months after Callahan was transferred, in what the jury may have considered an after the fact attempt to justify the transfer.[2] There was no evidence before the jury to indicate that Callahan's speech disrupted the work environment in Zone 5.[3] Thus, there was no need for the *Pickering* analysis at trial, and it is equally out of place on a motion for judgment as a matter of law.

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[2] The court's function is not to second-guess what the jury might have thought of the EEO report issued so many months later. It is enough to note that there was evidence to support a good dose of juror skepticism.

[3] The defendants attempted to have Pat Callahan testify that the plaintiff had been creating problems in Zone 5 by telling people about his DII report against Fermon and Carper. The court ruled Pat Callahan's testimony to be inadmissible hearsay. Pat Callahan's source of information, Sue Voges, testified by deposition. Nothing in her deposition supported the assertion that the plaintiff told people in Zone 5 about his DII report.

The defendants also argue that there was no evidence of a causal relationship between Callahan's protected speech and his transfer. The temporal proximity speaks volumes. Callahan met with Department of Internal Investigations (DII) officials in April and early May 2003. Fermon wrote a very detailed memo criticizing Callahan's work performance in early-to-mid May; Carper saw the letter when she returned from vacation about a week after that; and the decision to transfer Callahan was made shortly thereafter.[4] That the ISP violated DII protocol by bringing Carper into its investigation despite the fact that Callahan had raised allegations about her conduct strengthened the causal connection.

The defendants assert that they are entitled to qualified immunity because it was not well established that a lateral transfer with no loss of pay or benefits constitutes retaliation. However, the defendants are career ISP officers who must be aware that, among the officers, investigations work is viewed as a more prestigious assignment than patrol. Major Edie Casella stated as much. Callahan had worked in investigations for years, coordinating with local, state and federal law enforcement agencies and task forces, whereas his assignment in patrol required that he spend his time on more mundane and less challenging

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[4] Fermon argues that the jury verdict in favor of Brueggemann shows Callahan would have been transferred regardless of his speech. This is Fermon's speculation, with which the court disagrees.

tasks such as traffic violations. Callahan testified he felt demoralized by the transfer. It stretches the imagination to argue that a transfer from investigations to patrol would not be considered retaliatory, especially when Carper knew that Callahan did not want a patrol position.

The motions for judgment as a matter of law [#101, #106] are denied in their entirety.

II.

Fermon and Carper have also filed motions for a new trial, or in the alternative, motions to alter or amend judgment.

A.

On a motion for new trial, the court must determine whether the verdict is against the manifest weight of the evidence. *Sokol Crystal Prods., Inc. v. DSC Comm. Corp.*, 15 F.3d 1427, 1432 (7th Cir. 1994). The defendants argue that the jury's decision was not supported by the evidence. However, the jury is entitled to weigh conflicting evidence as it sees fit and draw inferences from all the testimony and exhibits, *Littlefield v. McGuffey*, 954 F.2d 1337, 1348 (7th Cir. 1992) ("The jury is the trier of fact – charged with determining the credibility of the witnesses, weighing the evidence, and drawing reasonable inferences."). The plaintiff offered significant, highly persuasive evidence in his favor. That the defendants presented

conflicting evidence does not require a new trial. The jury was in the best position to determine the credibility of the witnesses and obviously found the plaintiff's evidence more persuasive. The court has carefully considered the defendants' arguments and finds them unavailing.[5]

One of the defendants' arguments, with which the court disagrees, warrants particular note. Carper argues that "Brueggemann testified (and the jury must have believed him to find in his favor) . . . " There is no indication that the jury believed every aspect of Brueggemann's testimony; the verdict simply reflects that the jury found the evidence insufficient to justify a finding against him.[6]

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[5] Fermon argues in his motion for new trial that the testimony of Pat Callahan and Dave Lenartowicz was wrongly excluded. The court has already addressed the argument as to Pat Callahan. Dave Lenartowicz's testimony would have suggested that the plaintiff was wrong about the existence of a DEA overhear. The issue, however, is not whether the plaintiff was right or wrong, but whether he believed that Fermon had compromised a federal investigation, a belief that witnesses Greg Dixon and Nate Williams apparently shared. Moreover, Lenartowicz was not listed in the defendants' witness list in the pretrial order and the compromise of the overhear was known to the parties as a relevant fact in the case.

[6] Brueggemann stated that he recommended Callahan's transfer based on what EEO officer Suzanne Bond told him. The jurors may have concluded from all the evidence that Fermon and Carper were the driving force behind the transfer and Brueggemann simply relied on the excuses *they* – and not Bond – gave him. The jury might also have believed that Bond was

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B.

Where jury instructions do not adequately state the law, resulting in prejudice to the movant, a new trial must be held. *Susan Wakeen Doll Co., Inc. v. Ashton-Drake Galleries*, 272 F.3d 441, 452 (7th Cir. 2001). Where "considering the instructions as a whole, along with all of the evidence and arguments, the jury was misinformed about the applicable law," a new trial is warranted. *Susan Wakeen Doll Co.*, 272 F.3d at 452.

The defendants' arguments primarily revolve around the *Mt. Healthy* defense and the *Pickering* balancing test. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering*, 391 U.S. 563.

1. *Mt. Healthy* defense

The defendants argue that the court erred in instructing the jury to determine whether "*the defendant under consideration* would have caused Callahan's reassignment even if he had not spoken on what he perceived as an actual or potential wrongdoing . . . and everything else stayed the same." The error, argue the defendants, is that the instruction led the jury to conclude that Carper could be held liable even if Brueggemann would have made the

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contacted to corroborate a set of facts that Fermon and Carper had already assembled to justify the transfer.

decision anyway. The defendants cite *Stagman v. Ryan*, 176 F.3d 986, 1002-03 (7th Cir. 1999) to support their argument that since Callahan's transfer would have occurred regardless of the protected speech, none of the defendants can be held liable. However, the evidence did not conclusively establish that Callahan would have been transferred regardless of his speech. It is obvious that the jury drew the opposite conclusion.

The jury heard evidence that after Callahan implicated both Fermon and Carper in his DII report, Fermon wrote a letter to Carper criticizing Callahan's work, and Carper discussed Callahan's job performance with Brueggemann. Bond did not compile her summary of interviews until almost half a year later, several weeks after Callahan filed his lawsuit. The jury was entitled to draw the reasonable inference that Bond wrote the summary of interviews so as to justify the transfer. The jury apparently viewed the EEO report[7] with skepticism; instead, the jurors concluded from all the evidence that Fermon and Carper retaliated against Callahan for speaking out to DII.

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[7] Carper and Fermon did not initiate the request for the EEO investigation. The investigation was begun when ISP officials learned of an alleged hostile work environment in Zone 5 – a situation unrelated to the ISP's concerns about Callahan. In fact, the hostile environment related to allegations against Fermon, not Callahan. The jury may have concluded that the EEO investigation was commandeered as a way to justify the transfer.

2. *Pickering* Balancing Test

The *Pickering* test requires that an employer's interest in maintaining an effective work environment be balanced against the employee's interest in speaking out. *Pickering,* 391 U.S. at 568. The defendants continue to argue that, contrary to the Seventh Circuit's opinion in this case, the court erred by failing to give the *Pickering* instructions and special interrogatories. At summary judgment, the defendants argued that the *Pickering* factors were relevant to this case; however, they failed to present sufficient evidence at trial to show that the disruptive work environment in Zone 5 had anything to do with Callahan's protected speech. This makes the *Pickering* analysis inapplicable.

3. Speech in reckless disregard of the truth

Fermon argues that the court erred in instructing the jury that "freedom of speech does not extend to speech . . . that [is] deliberately false or malicious" when the correct standard is speech that is "knowingly false or in reckless disregard for the truth," citing *Brenner v. Brown,* 36 F.3d 18, 20 (7th Cir. 1994). When taken as a whole, the applicable principles of law were adequately communicated to the jury; a new trial is not warranted.[8] *Susan Wakeen Doll Co.,* 272 F.3d at 452.

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[8] There was no indication that Callahan recklessly disregarded the truth. Greg Dixon and Nate Williams had the same

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The court has carefully considered each of the remaining arguments pertaining to the jury instructions and sees no reason to rule differently than it did at trial.

C.

The court's post-trial inquiry on compensatory damages relates to whether the award of $210,000 is "monstrously excessive, a product of passion and prejudice, or if there is no rational connection between it and the evidence." *Cygnar v. City of Chicago*, 865 F.2d 827, 847 (7th Cir. 1989). Callahan suffered physical and emotional effects from his transfer to a position the defendants knew he did not want.[9] Callahan, and others, perceived the transfer as punishment for speaking out, and the jury apparently agreed. In *Lust v. Sealy, Inc.*, 383 F.3d 580, 589 (7th Cir. 2004), the court considered a compensatory award for primarily emotional damages. It did not find the compensatory damage award to lack a rational connection to the evidence. "[The plaintiff] testified and the jury was entitled to believe that she experienced nontrivial symptoms of anxiety and other forms of emotional distress. . . . [The plaintiff's] reactions may have been abnormal, but the tortfeasor

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concerns about Fermon and urged Callahan to report Fermon's conduct to DII.

[9] Capt. John Strohl had previously told Carper that Callahan was not interested in a transfer to patrol.

takes his victim as he finds him . . . " (*citing Brackett v. Peters,* 11 F.3d 78, 81 (7th Cir. 1993); *Tompkins v. Cyr,* 202 F.3d 770, 780 (5th Cir. 2000); *Jenson v. Eveleth Taconite Co.,* 130 F.3d 1287, 1294-95 (8th Cir. 1997)).

D.

As noted at the outset, the jury awarded Callahan punitive damages in the amount of $195,600 against Carper and $276,700 against Fermon. The post trial motions raise the question of the reasonableness of those awards. *Pacific Mut. Life Ins.* Co. *v. Haslip,* 499 U.S. 18, 18-20 (1991). The jury was instructed that the purpose of punitive damages was to punish a defendant for his or her conduct and to deter others from engaging in similar conduct in the future. The jury was told to consider the factors that are described in *Pacific Mut. Life Ins. Co.*, 499 U.S. at 18-20 and *TXO Prod. Corp v. Alliance Res. Corp.,* 509 U.S. 443, 460 (1993), in determining what amount to award. *See also Mathias v. Accor Econ. Lodging, Inc.,* 347 F.3d 672, 676-77 (7th Cir. 2003); *Price v. Highland Cmty. Bank,* 932 F.2d 601, 603-605 (7th Cir. 1991).

The compensatory damages of $210,000 have a rational connection to the evidence; but the punitive damages against Carper equal 93% of the compensatory award and 132% of that award against Fermon. The court concludes that, even considering the jury's probable outrage at the defendants' conduct in discharging their governmental responsibilities in the

investigation and prosecution of criminal cases, the punitive damages are excessive and not reasonable.

The purpose of exemplary damages is to punish and deter, not to destroy. Carper and Fermon are police officers. They are not corporate executive officers. The court knows from the record, but the jury was not aware and it was not argued to them, that the defendant Carper's annual salary is $115,000 and Fermon's is $104,236. The court finds that, considering all the factors outlined in the court's jury instructions, a reasonable punitive damage award against Carper would have been $50,000 and against Fermon would have been $100,000. That reflects the comparative reprehensibility of the defendants that must have weighed with the jury and serves to punish the defendants but not to destroy them. Accordingly, a remittitur will be ordered.

Fermon's motion for a new trial [#103] and Carper's motion for a new trial [#104] are denied. The motions to alter or amend judgment [#103, #104], to the extent they seek a remittitur of the punitive damages awards, are granted as follows: the punitive damage award against Carper is reduced to $50,000 and the punitive damage award against Fermon is reduced to $100,000.

III.

Also before the court is Brueggemann's motion for a bill of costs [#117]. He seeks reimbursement for deposition costs, trial transcripts, and exemplars

used at trial, totaling $7,483.98. There is no indication that Brueggemann personally must pay the cost of his defense. Moreover, "a defendant in a civil rights suit can obtain an award of fees only if the suit is adjudged frivolous[.]" *Vukadinovich v. McCarthy*, 59 F.3d 58, 61 (7th Cir. 1995) (*citing Bisciglia v. Kenosha Unified Sch Dist. No. 1*, 45 F.3d 223, 227-28 (7th Cir.1995)). Callahan proved a prima facie case against Brueggemann. A suit is not frivolous simply because the jury finds in favor of the defendant, and to award fees and expenses to the prevailing defendant in a non-frivolous case would have a chilling effect on the filing of civil rights cases in general. The fee shifting provision is meant to "encourage the filing of meritorious civil rights suits." *Vukadinovich*, 59 F.3d at 61. Consequently, Brueggemann's motion for a bill of costs [#117] is denied in its entirety.

CONCLUSION

For the foregoing reasons, Fermon's motion for judgment as a matter of law [#101] is denied. Fermon's motion for a new trial [#103] is denied. Fermon's motion to alter or amend judgment [#103] is granted; the punitive award is reduced to $100,000 and a remittitur of $176,700 is ordered as to Fermon. If the plaintiff fails to accept the remittitur within twenty-one (21) days of this order, then a new trial as to punitive damages only against Fermon is granted. Carper's motion for judgment as a matter of law [#106] is denied. Carper's motion for a new trial [#104] is denied. Carper's motion to alter or amend

judgment [#104] is granted; the punitive damage award is reduced to $50,000 and a remittitur of $145,600 is ordered as to Carper. If the plaintiff fails to accept the remittitur within twenty-one (21) days of this order, then a new trial as to punitive damages only against Carper is granted. Callahan's motion for attorney fees and costs [#108] remains pending. Pursuant to the court's May 31, 2005 order, Callahan shall submit a supplemental petition for fees and costs within twenty-one (21) days of the date of this order, and the defendants may file a response within fourteen (14) days thereafter. Brueggemann's motion for a bill of costs [#117] is denied in its entirety.

The clerk is directed to enter judgment in accordance with this order and memorandum opinion.

Entered this 12th day of October, 2005.

s/ **Harold A. Baker**
HAROLD A. BAKER
UNITED STATES
DISTRICT JUDGE

United States District Court
CENTRAL DISTRICT OF ILLINOIS
AMENDED
JUDGMENT IN A CIVIL CASE

MICHALE E. CALLAHAN,
Plaintiff

vs.

CHARLES E. BRUEGGEMANN, DIANE CARPER AND STEVEN M. FERMON,
Defendants.

Case Number **03-2167**
(E-Filed Oct. 12, 2005)

☒ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff Michale E. Callahan and against the defendants Diane Carper and Steven M. Fermon, jointly and severally in the amount of $210,000.00 as compensatory damages.

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of defendant Charles E. Brueggemann and against the plaintiff Michale E. Callahan.

IT IS FURTHER ORDERED AND ADJUDGED that an additional judgment is entered in favor of the plaintiff Michale E. Callahan and against

the defendant Diane Carper in the amount of $195,600.00 as punitive damages.

IT IS FURTHER ORDERED AND ADJUDGED that an additional judgment is entered in favor of the plaintiff Michale E. Callahan and against the defendant Steven M. Fermon in the amount of $276,700.00 as punitive damages. Costs are assessed against the defendants Diane Carper and Steven M. Fermon.

IT IS FURTHER ORDERED AND ADJUDGED pursuant to Order entered October 12, 2005 the punitive award is reduced to $100,000 and a remittitur of $176,700 is ordered as to Steven M. Fermon.

IT IS FURTHER ORDERED AND ADJUDGED pursuant to Order entered October 12, 2005 the punitive damage award is reduced to $50,000 and a remittitur of $145,600 is ordered as to Diane Carper.

ENTER this 12th day of October, 2005.

s/ JOHN M. WATERS, CLERK
JOHN M. WATERS, CLERK

s/ S. Johnson, Deputy Clerk
BY: DEPUTY CLERK

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 15, 2008

Before

FRANK H. EASTERBROOK, *Chief Judge*

KENNETH F. RIPPLE, *Circuit Judge*

ILANA D. ROVNER, *Circuit Judge*

Nos. 05-4313, 05-4335, 06-1055, 06-1098

MICHALE CALLAHAN,
Plaintiff-Appellee,

v.

STEVEN M. FERMON and DIANE CARPER,
Defendants-Appellants.

Appeals from the United States District Court for the Central District of Illinois.

No. 03 C 2167

Harold A. Baker, *Judge*

ORDER

Upon consideration of Plaintiff-Appellee's petition for rehearing en banc, filed on June 3, 2008, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 6, 2008

Mr. James P. Baker
Baker, Baker & Krajewski, LLC
415 South Seventh Street
Springfield, IL 62701

Re: Michale Callahan
v. Steven M. Fermon, et al.
Application No. 08A288

Dear Mr. Baker:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on October 6, 2008 extended the time to and including November 27, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Melissa Blalock
Melissa Blalock
Case Analyst

NOTIFICATION LIST

Mr. James P. Baker
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415 South Seventh Street
Springfield, IL 62701

Clerk
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for the Seventh Circuit
219 S. Dearborn Street, Room 2722
Chicago, IL 60604

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No. 08-720

Supreme Court, U.S.
FILED
MAY 1 - 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHALE CALLAHAN,

Petitioner,

v.

STEVEN M. FERMON AND DIANE CARPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the appellate court's determination that petitioner's speech was undertaken pursuant to his official duties for purposes of the First Amendment analysis set out in *Garcetti v. Ceballos,* 547 U.S. 410 (2006), when petitioner himself admitted that he spoke as part of his job responsibilities; his current claim otherwise implicates no genuine split in authority, only manufactured splits that this case would not implicate in any event; and where a holding by this Court that the lower court misapplied *Garcetti* would have no effect on the outcome because respondents are entitled to judgment on an alternate, threshold ground.

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BRIEF IN OPPOSITION

The petition for certiorari should be denied. Petitioner admitted that he engaged in the speech at issue pursuant to his job responsibilities and thus may not complain now that the Seventh Circuit relied on his concessions to hold exactly that. In fact, any error in the lower court's application of *Garcetti v. Ceballos*, 547 U.S. 410 (2006), cannot change the outcome here because respondents are entitled to qualified immunity under even petitioner's theory of First Amendment law. Finally, this case implicates no split in authority. Petitioner alleges multiple splits, but they are wholly manufactured, and in any event involve questions not posed on the facts of this case.

STATEMENT

This is an employment case, not a murder case. Two separate juries heard the evidence and convicted Randy Steidl and Herbert Whitlock. Tr. 1399, *Whitlock v. Godinez*, 51 F.3d 59, 64 n.6 (7th Cir. 1995); *People v. Whitlock*, 528 N.E.2d 1371, 1374 (Ill. App. Ct. 1988); *People v. Steidl*, 568 N.E.2d 837, 841-42 (Ill. 1991). Because this petition concerns petitioner's First Amendment retaliation claim, respondents will primarily focus on the undisputed facts establishing that petitioner was speaking pursuant to his official duties.

In the spring of 2000, a private investigator for Steidl's post-conviction attorney sent a letter to the

Illinois State Police ("ISP"), asking it to review aspects of the murder of Dyke and Karen Rhoads. Pet. App. 3. Petitioner, who was assigned to the matter, *ibid.*, reviewed the case file created by the initial investigators as well as information provided by the private investigator, Tr. 1403-1404, and issued written conclusions indicating his view that there were problems with the convictions, Pet. App. 3. But petitioner also wrote that the purpose of his review was "not to indicate the guilt or innocence of either R. Steidl or H. Whitlock." PX 69. He further stated: "Certainly in my mind, Whitlock still remains a viable suspect, especially if my time line for the murders is correct." *Ibid.* Additionally, Petitioner had become suspicious that a person named Robert Morgan might have been involved in the murders. Pet. App. 3. During this time, federal authorities were investigating Morgan for a number of crimes, including drug trafficking and money laundering. *Ibid.* According to petitioner, he was not allowed to investigate Morgan regarding the Rhoads murders, but he could investigate Morgan for other possible criminal activities. *Ibid.*

For the next two and a half years, petitioner and the ISP continued to investigate Morgan. Among other things, the ISP conducted aerial surveillance of Morgan's properties using the Wisconsin Air National Guard and installed video cameras in a mobile home adjacent to one of Morgan's businesses to conduct surveillance. Tr. 1223-1226.

On January 8, 2003, an Illinois deputy governor called petitioner and explained that the governor was considering clemency for Steidl and Whitlock. Pet. App. 3. According to petitioner, the deputy governor asked for petitioner's opinion on the merits of the convictions. *Ibid.* Petitioner stated that he needed to speak with his superiors before responding. Pet. App. 4. Petitioner then called Steven Fermon, his supervisor and a respondent here, resulting in a meeting the next morning at the ISP Academy. Tr. 1130, 1552-1553.

Petitioner was ordered to attend the meeting, which lasted all day, and present information regarding his investigation. Tr. 1234-1236. As an ISP lieutenant, petitioner's job required him to attend meetings, exchange information regarding his investigations, answer questions from superior officers, keep these officers apprised of issues, be prepared to interact with peers, and report up the chain of command. LPR. 28-8, pp. 4-11. ISP investigators from throughout Illinois attended the January 9, 2003 meeting, which was held on ISP property during normal working hours and was open to ISP employees only. Tr. 1014, 1131, 1234-1236. Both Fermon and petitioner made presentations. Petitioner described his suspicions about Morgan's other possible criminal activities and, as a result, was ordered to create a plan to investigate Morgan further. Tr. 1135-1137. The ISP Deputy Director said he wanted a "full court press," that is, a full-scale investigation in conjunction with federal authorities

of Morgan and his associates. Within weeks, a task force comprised of numerous federal and state law enforcement agencies was created to investigate Morgan. Tr. 1245. The task force first met in February and continued to meet throughout 2003. Tr. 1429.

Throughout this time, petitioner's relationship with Fermon was strained. Pet. App. 4. By 2003, petitioner had become suspicious that Fermon was compromising the Morgan investigation, *ibid.*, because Fermon had told petitioner he had eaten pizza at a restaurant supposedly owned by a felon, Tr. 1362-1363, 1603, 1632. Petitioner made this claim even though he had information proving the restaurant was not, in fact, owned by a felon. Tr. 1603, 1632. Petitioner also alleged that Fermon had "ties" to organized crime, Tr. 1342, because Fermon's wife's sister's nephew was related to a mobster murdered in 1932, Tr. 1326, 1343-1344.

The hostility between petitioner and Fermon made their office a difficult place to work. Pet. App. 5. Between late 2002 and April 2003, the ISP's Equal Employment Opportunity Office (EEOO) investigated a hostile work environment complaint arising out of the stress in the office. *Ibid.* In April 2003, the EEOO informed ISP's upper command, who in turn informed Diane Carper, also a respondent here, that the employees had broken into "camps" or "teams" – one favoring Fermon and the other favoring petitioner. Tr. 1393, 1640-1642.

In April, after the EEOO interviewed petitioner, he contacted the ISP's Division of Internal Investigations ("DII") to report his suspicions of misconduct by Fermon. Tr. 1322, 1326. ISP policy specifically requires ISP employees to report alleged wrongdoing of other ISP employees to DII. PX 77 (employees must report misconduct "when misconduct is observed"). Before contacting DII, petitioner spoke with a fellow task force member who was an FBI agent. Tr. 710, 1340. Petitioner spoke to the FBI agent as a friend about his plans to complain to DII regarding Fermon. *Ibid.*

In May 2003, petitioner made a second complaint to DII, reasserting his allegations about Fermon and adding a claim that Carper had blocked the Rhoads homicide investigation. Tr. 1251-1252, 1322, 1326. Because petitioner's allegation involved a federal investigation, DII met with the local FBI upper command. Tr. 1027, 1596. DII informed the FBI of the allegations, but the FBI decided against investigating them. Tr. 1597, 1600-1603. After reviewing the complaints and meeting with the FBI, DII similarly determined not to take action on the allegations. Pet. App. 5.

Following the EEOO's reports to the ISP's upper command, it was determined to transfer both petitioner and Fermon to different offices. Tr. 655-656, 1557-1563, 1060-1061. Every witness who testified regarding the process leading up to this decision stated that petitioner's statements at the January 9, 2003 meeting and his DII complaints were

not considered in his lateral transfer, and, moreover, that Fermon was not involved in the transfer decision. Tr. 231, 248, 253, 670-671, 1161-1163, 1567-1568, 1644-1649. In fact, Fermon, who resides in Vermillion County on the Indiana border, was transferred to Springfield, Tr. 1561, which is over 100 miles away. For his part, petitioner was transferred to a nearby office and suffered no reduction in pay or supervisory responsibilities. Tr. 1450-1452, 1566.

Following his transfer, petitioner sued, claiming that he suffered retaliation for engaging in protected speech on three occasions: (1) his statements at the January 9, 2003 meeting, (2) his April 2003 DII complaint, and (3) his May 2003 DII complaint. Pet. App. 5. Nothing in petitioner's complaint, the final pre-trial order, or the jury instructions alleged any retaliation for statements made to the FBI or any other federal, state, or local agency. Tr. 1801, 1905.

Petitioner testified that he had gone to the DII with his suspicions about Fermon and Carper because his job required him to do so. LPR. 28-2, p. 52 ("My job was to bring the concerns and allegations to [DII]."). During closing argument, his counsel echoed this point, arguing to the jury that petitioner went to the DII because he "did what the policies and procedures of the Illinois State Police mandate." Tr. 1834-1835. Even on appeal, Petitioner continued to assert that he had a professional obligation to make complaints to DII, arguing in his brief to the Seventh

Circuit that he had "a professional obligation to come forward." Appellee's Br. 46.

REASONS FOR DENYING THE PETITION

There are multiple, independent reasons for denying the petition. First, the rule announced in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), was based upon the parties' stipulation that the employee's actions were made pursuant to his job duties. This case is no different. Here, petitioner and his counsel repeatedly admitted that petitioner's statements to DII were made pursuant to his job duties. Those concessions alone, unmentioned anywhere in the petition, make further review by this Court unwarranted.

Second, even if this Court were to conclude that the Seventh Circuit misapplied *Garcetti* (and it did not), such a conclusion would have no effect on the outcome of this case – the Court would still be required to affirm on the independent ground that respondents are entitled to qualified immunity. Respondents consistently argued below that they had violated no clearly established law. Because the Seventh Circuit found no violation of petitioner's constitutional rights, it did not need to reach the issue of qualified immunity. But in this Court petitioner argues that courts are confused over the proper application of *Garcetti*. If that is true, then qualified immunity applies. Indeed, following this Court's recent decision in *Pearson v. Callahan*, 129 S. Ct. 808

(2009), it would be appropriate to resolve any further appeal on this ground, without even reaching the *Garcetti* question on which petitioner seeks review.

Third, this case implicates no split in authority. At the outset, petitioner's heavy reliance on district court and unpublished appellate court decisions demonstrates that the rule announced in *Garcetti* has had insufficient time to percolate in the federal courts. But petitioner's cases are readily harmonized in any event. Courts are not divided over whether the nature of employee speech – was it or was it not made pursuant to the employee's job duties – is a question of law or a mixed question of law and fact. And even if courts were divided on this score, such a split would not be implicated in this case, where on appeal petitioner never sought a remand for renewed findings of fact. It is too late to advance that forfeited claim for the first time now. Nor does this case implicate any supposed split over whether an employment policy requiring employees to report misconduct makes such reports job-related for *Garcetti* purposes, for this argument depends entirely on a misstatement of Illinois law and ISP policy. Finally, petitioner alleges other issues that have purportedly confused lower courts, but this case does not implicate any one of those issues, nor is there any genuine conflict as to any of them.

Accordingly, the certiorari petition should be denied.

I. Petitioner Repeatedly Admitted That His Speech Was Made Pursuant To His Official Duties, Meaning Petitioner Has Conceded Away The *Garcetti* Question He Now Presents To This Court.

As petitioner points out, in *Garcetti*, the parties conceded that the employee speech in that case "was made pursuant to [the employee's] job duties." Pet. 3 (internal quotations omitted). But this case is no different because petitioner repeatedly admitted that his statements to DII were made pursuant to his job duties. In fact, the Seventh Circuit specifically relied on these admissions to hold that petitioner's statements were not constitutionally protected. Pet. App. 10.[1] First, during his deposition, petitioner testified that it was part of his job to inform DII of the alleged misconduct:

> And what I told DII at that meeting was that it wasn't my job to determine. I came to them with concerns. I certainly hope that a captain in the Illinois State Police would not do criminal activity, but that wasn't my job to

---

[1] In the Seventh Circuit, petitioner argued that he suffered retaliation for: (1) his statements at the January 9, 2003 ISP Academy meeting, and (2) his two complaints to DII. Petitioner focuses the petition for certiorari on the latter claims, implicitly conceding that the Seventh Circuit correctly held that the statements at the meeting – which petitioner's supervisor required him to attend and where he spoke about the results of an investigation he had been ordered to undertake – were within his job duties.

> determine. *My job was to bring the concerns and allegations to them.* It was their job to investigate to see what my concerns – what my concerns and allegations were factual or not.

LPR. 28-2, p. 52. Petitioner's counsel reiterated the admission during closing argument. He stated:

> Now, I think I told you earlier they have said that Michale Callahan went to DII, or they are going to tell you, Michale Callahan went to DII out of animosity or spite towards Steve Fermon. * * * If you have concerns, what do you do? You go to the Division of Internal Investigations. He did what he was supposed to do. *He did what the policies and procedures of the Illinois State Police mandate that you do*, and look what happened to him.

Tr. 1834-1835 (emphasis added). Finally, petitioner admitted in his brief to the Seventh Circuit that he had an occupational duty to report misconduct to DII: "In a very broad sense, Callahan did have a professional obligation to come forward." Appellee's Br. 46.

Courts consistently hold that *Garcetti* bars First Amendment claims where, as here, the plaintiff admits that his speech was made pursuant to his job duties. See *Battle v. Bd. of Regents of the State of Georgia*, 468 F.3d 755, 761 (11th Cir. 2006) (relying on "Plaintiff's own admission" to hold that speech "was

made pursuant to her official employment responsibilities"); *Hill v. Borough of Kutztown*, 455 F.3d 225, 242 (3rd Cir. 2006) (relying on concession in complaint and appellate brief that plaintiff spoke "pursuant to his official duties" and as "part of his duties as Manager"); *D'Angelo v. Sch. Bd. of Polk County*, 497 F.3d 1203, 1210 (11th Cir. 2007) (plaintiff's claim barred by admission that speech was made pursuant to job duties); *Sigsworth v. Aurora*, 487 F.3d 506, 511 (7th Cir. 2007) (plaintiff's claim barred by admission that he was merely doing what employer expected of him).

Accordingly, petitioner's admissions alone doom his First Amendment claim, making it unnecessary for the Court to address any of the *Garcetti* issues on which petitioner seeks review.

II. Petitioner's Suit Fails At The Threshold On Qualified Immunity Grounds, Before Even Reaching His First Amendment Claim.

Petitioner's request for this Court's review is predicated upon the alleged existence of a split in authority regarding the proper application of *Garcetti*. But if such a split exists, respondents would be entitled to qualified immunity, see, *e.g.*, *Pearson*, 129 S. Ct. at 822-823, as they consistently argued below,

App. 7.[2] Qualified immunity exists whenever officials are alleged to violate a constitutional right that is not clearly established. *Pearson*, 129 S. Ct. at 823 (holding that police officers were entitled to qualified immunity because "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.") (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). In short, petitioner seeks further review on the grounds that the law is unclear, but if the law is unclear, then respondents are entitled to qualified immunity. And following this Court's recent decision in *Pearson*, it would be appropriate to affirm the judgment below on qualified immunity grounds, before even reaching the merits of petitioner's First Amendment claim.

III. Petitioner Identifies No Circuit Split, And Even The False Splits He Alleges Would Not Be Implicated By This Case.

Petitioner identifies three purported circuit splits: (1) one over whether the *Garcetti* analysis raises a question of law or a mixed question of law and fact, Pet. 17-23; (2) another over whether a

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[2] In addition to qualified immunity, respondents argued several other grounds for reversal, including lack of causation, improper jury instructions, and evidentiary issues. Each of these presents an independent ground for affirming the judgment below.

workplace policy requiring employees to report misconduct means that such reporting is work-related for *Garcetti* purposes, Pet. 24-31; and (3) still another over the proper treatment of three purportedly recurring factors used in determining whether employee speech is work-related, Pet. 31-37. Each of these alleged splits is manufactured, and even if genuine, none of them would be implicated here.

A. This Case Implicates No Split Of Authority Over Whether *Garcetti* Presents A Question Of Law Or A Mixed Question Of Law And Fact.

Petitioner relies chiefly on a purported, post-*Garcetti* circuit split over whether a court answers a question of law, or a mixed question of law and fact, when it decides if employee speech was pursuant to the employee's job duties. If courts must analyze the issue as a mixed question of law and fact, then petitioner argues he was entitled to a remand to the district court for additional fact-finding. But this is not grounds for certiorari review for three, independent reasons: (1) petitioner never requested a remand for additional fact-finding from the Seventh Circuit, and it is too late to advance this forfeited claim now; (2) the split that petitioner alleges does not exist; and, (3) even if it did, it is immaterial because petitioner *admitted* that he spoke to DII pursuant to his official duties.

1. Petitioner now seeks a ruling directing the court of appeals to remand his case for further fact-finding, but he never asked the Seventh Circuit for that relief. Nowhere in petitioner's appellate brief did he argue that *Garcetti* poses a mixed question of law and fact requiring a remand for additional proceedings. Instead, petitioner's 84 page brief included nothing more than a single passing comment on the standard of review, without asking for a remand. Appellee's Br. 39-40. And during oral argument, although the court repeatedly asked petitioner's counsel whether he was seeking a remand, counsel repeatedly urged the court not to remand the case but to affirm the trial judgment outright. Oral Argument, No. 05-4313, dated January 10, 2008 at 27:13 through 28:00 (found at www.ca7.uscourts.gov). Only after repeated questions from the bench did counsel begrudgingly acknowledge that a remand "might" be in order:

> Question: Well, that's why I am asking you if you think it should be remanded. You gave me a different response a moment ago.
>
> Answer: I don't think this case should be reversed outright. I think that on the record we win. But if the Court feels differently I concede that a remand might be necessary.

Oral Argument, No. 05-4313, dated January 10, 2008 at 35:02 through 35:32 (found at www.ca7.uscourts.

gov). Indeed, even in his petition for rehearing *en banc*, petitioner again failed to make any argument that *Garcetti* issues pose a mixed question of law and fact requiring a remand for additional fact-finding.

Petitioner may not argue for the first time in this Court that the Seventh Circuit implicitly reached an erroneous legal conclusion, and thereby failed to remand the case for further fact-finding, when petitioner never raised his current legal argument (that the statements were made pursuant to his job duties is a mixed question of law and fact requiring a remand) at any point before that court, much less ask that court to remand for additional proceedings. See, *e.g.*, *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) ("We cannot decide issues raised for the first time here."); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily, an appellate court does not give consideration to issues not raised below."). Accordingly, this case is not a vehicle for resolving the alleged split to which petitioner devotes the bulk of his petition.

2. In any event, there is no conflict between the law in any other circuit and the Seventh Circuit's implied conclusion that determining whether employees' statements are made pursuant to their job duties can be a question of law. Petitioner is simply wrong to assert that this is invariably a mixed question of law and fact in the Second, Third, Eighth, or Ninth circuits. The Third Circuit has reviewed the *Garcetti* question as a matter of law in at least two decisions. In *Hill* the court held that

> [i]nsofar as it is based on this report to the Borough Council, Hill's First Amendment claim must fail because, as Hill concedes, he reported Marion's conduct and harassing actions to the Borough Counsel 'pursuant to his official duties.' Under *Garcetti* he was not speaking as a citizen when he made these reports, and, thus, *as a matter of law,* the reports are not protected speech.

455 F.3d at 242 (emphasis added). Subsequently, in *Reilly v. City of Atlantic City,* 532 F.3d 216 (3d Cir. 2008), the Third Circuit again reviewed the *Garcetti* question as a matter of law: "[T]he fact of Reilly's sworn testimony at the Munoz trial is sufficiently developed on this appeal for us to determine as a matter of law whether that speech was made 'pursuant to his official job duties' * * * ." *Id.* at 227 (quoting *Garcetti*, 547 U.S. at 421). Likewise, the Eighth Circuit has held that, under *Garcetti*, "[t]he inquiry into the protected status of speech is one of law, not fact." *Hyalla v. Transportation Commc'n Int'l Union,* 536 F.3d 911, 919 n.4 (8th Cir. 2008).

The Second Circuit also appears to treat this issue as a question of law. In *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006), the court explained that, under *Garcetti*, an employee's speech is entitled to First Amendment protection only if he was not speaking pursuant to his duties as an employee. See *id.* at 415. Without discussing the need for fact-finding by the lower court, the court concluded: "That is clearly not the case here." *Ibid.* It is not surprising then that

the district court cases upon which petitioner relies, Pet. 21, do not say that the Second Circuit employs a mixed question standard when applying *Garcetti*. Rather, these cases simply reiterate *Garcetti*'s mandate that determining the scope of an employee's job duties is a fact-specific, practical inquiry. See *Jackson v. Jimino*, No. 1:03-CV-722, 2007 WL 189311, at *6 (N.D.N.Y. Jan. 19, 2007) ("In determining whether the speech was pursuant to a plaintiff's official duties, the Supreme Court has noted that a court must make a practical inquiry into the situation * * * ."); *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 382-383 (E.D.N.Y. 2007) ("It is clear, however, that application of *Garcetti* requires a fact-specific inquiry.").

Finally, although petitioner relies on the Ninth Circuit's decision in *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007), that court has not held conclusively that the *Garcetti* analysis is a mixed question of law and fact. Compare *Marable*, 511 F.3d at 930-933, with *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008). Indeed, even the district courts in the Ninth Circuit recognize that the issue remains unresolved there. See, *e.g.*, *Maniates v. Lake County Oregon*, No. CV 08-3038-PA, 2009 WL 395159, at *1 n.1 (D. Or. Feb. 12, 2009) ("Ninth Circuit precedents seem to be inconsistent on whether the *Garcetti* determination is made by the court or the jury.")

In short, the circuit split petitioner claims simply does not exist. And because the circuits are not truly

split, there is no need for certiorari. The Second, Third, and Eight Circuits are in line (and the Ninth may well be) not only with the Seventh Circuit's decision in this case, but with other courts, which even petitioner concedes permit the *Garcetti* question to be resolved as a matter of law. Pet. 18 ("Like the Seventh Circuit, the First, Fifth, Tenth, and District of Columbia Circuits have concluded that the question is purely legal.") Moreover, although petitioner does not mention it, the Eleventh Circuit is also in accord. See, *e.g.*, *Battle*, 468 F.3d at 760.

3. And even if there were a split, this case would not provide a vehicle to resolve it. Petitioner not only failed to raise the issue below, but he also conceded repeatedly that he spoke to DII as part of his job duties. See *supra* pp. 9-11. Accordingly, the (unpreserved) question that this case presents is not whether statements made pursuant to job duties are generally a question of law, but whether they may be treated as a question of law where, as in *Garcetti* itself, the plaintiff admits that he spoke as an employee rather than as a member of the public. Indeed, even if petitioner were correct that *Garcetti* typically presents a mixed question of law and fact – contrary to every court to have reached a definitive answer on the question – that still would not mean that courts could not resolve the issue as a matter of law in those rare instances in which (as here) the plaintiff concedes the point.

B. There Is No Circuit Split Over The Effect Under *Garcetti* Of A Workplace Policy Requiring Employees To Report Misconduct.

Contrary to the petition, Pet. 24-31, there is no split over the effect of a general workplace policy requiring employees to report misconduct. Petitioner claims that the Seventh and Eleventh Circuits "are clearly at odds" with the Fifth and Ninth Circuits, *id.* at 28, and that several district courts are also in disagreement, at 24-25. And petitioner further maintains, Pet. 25-27, that his speech somehow falls outside the ambit of his job duties because he failed to follow the workplace reporting policy to the letter.

1. In fact, there is no genuine conflict over employment policies. Petitioner cites decisions that reach different outcomes, to be sure, but those differences are merely the product of different facts, not a dispute over governing legal principles. Thus, petitioner's claim that the Ninth Circuit's decision in *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), is inconsistent with the Seventh Circuit's decision in the present case and the Eleventh Circuit's in *Battle* is readily refuted by the significant factual distinctions among these decisions.

In *Freitag*, which holds that a former corrections officer's complaints to her state senator and the inspector general regarding alleged sexual harassment of female prison guards were protected speech, there was no admission that the speech at issue was

part of the officer's job duties. See 468 F.3d at 542-545. Both the present case and *Battle* involve such admissions, and they were dispositive on the *Garcetti* issue. See *supra* pp. 9-11 (discussing Petitioner's admission that his statements to DII were part of his job duties); *Battle*, 468 F.3d at 761 ("Plaintiff admitted that she had a clear employment duty to ensure the accuracy and completeness of the student files as well as to report any mismanagement or fraud she encountered in the student financial aid files.").[3] Moreover, the plaintiff in *Freitag* made external complaints, including to the inspector general's office and a state senator, which gave her speech "broader scrutiny." 468 F.3d at 545. In contrast, petitioner communicated his concerns through internal agency channels only. And like petitioner, the plaintiff in *Battle* limited her reporting to her place of employment, the Office of Financial Aid and Veterans Affairs. See 468 F.3d at 758-759 ("Plaintiff never spoke to anyone outside FVSU about Huff's fraudulent activities until after she received notice that her contract would be removed."). Standing alone, this distinction disposes of petitioner's purported split, for "the case law is unanimous in holding that employees'

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[3] Petitioner also relies upon *Williams v. Riley*, 275 Fed. Appx. 385 (5th Cir. 2008), an unreported decision without precedential value, see 5th Cir. Rule 47.5.2. *Williams*, like *Freitag*, is distinguishable from *Battle* on its facts. Similar to *Freitag*, there was no admission in *Williams*. In fact, the plaintiffs in *Williams* specifically denied that they had any official duty to report. See *id.* at *2.

communications that relate to his own job function up the chain of command, at least within his own department or division, fall within his official duties and are not entitled to First Amendment protection." *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008).

Petitioner attempts to avoid this result by arguing that he made complaints to outside agencies, such as the FBI and DII. Pet. 26. But petitioner ignores the district court's jury instructions, which provided that the speech at issue in this case did not include petitioner's conversation with the FBI agent. Tr. 1801 (identifying petitioner's claims as being based solely upon his statements to ISP officials at the Academy and to ISP's DII investigators). Moreover, petitioner went to his friend in the FBI solely for advice about how to proceed with his concerns, and the friend merely advised petitioner to speak with DII, which he did. Tr. 710.

As for DII, it is not a separate agency, as petitioner contends, but a division of the ISP. Illinois statutory law is clear in this regard: "The Department is divided into the Illinois State Police Academy and 4 divisions: the Division of Operations, the Division of Forensic Services, the Division of Administration, and *the Division of Internal Investigation.*" 20 ILCS 2605/2605-25. (emphasis added). As such, petitioner's assertion that his statements were made outside the ISP is a mischaracterization of Illinois law.

Finally, the plaintiff in *Freitag* was not required to report misconduct to outside agencies as part of her job. Instead, she elected to do so as a citizen. See *Freitag,* 468 F.3d at 545. In *Battle*, by contrast, Department of Education regulations required the plaintiff to report fraud and inaccuracies. See 468 F.3d at 761 (noting that DOE Guidelines require all financial aid workers to report suspected fraud). Likewise, ISP Directive PER-030 required petitioner to report the allegations that he brought to the DII.

2. Nor is there anything to petitioner's suggestion that his speech fell outside of his job duties because he failed to follow the ISP's reporting policy to the letter. Pet. 25-27. And this argument calls for mere error correction in any event. Petitioner contends that his speech was protected because he did not report Fermon's alleged misconduct immediately and directly up the chain of command, which would have required him to make the report to Fermon himself. But such departures from the letter of PER-030 do not undo petitioner's employment obligation to report his suspicions. It cannot be that fulfilling a job duty imperfectly somehow makes it any less a duty. Moreover, the undisputed evidence at trial established that petitioner was following established ISP policy by making the complaint directly to DII rather than to Fermon under these circumstances. Tr. 1253, 1276.

3. Finally, to the extent the federal district courts actually differ in the application of *Garcetti* to a work place policy requiring employees to report

misconduct, the courts of appeals, rather than this Court, should address any such differences in the first instance. At this point, the appellate courts simply have not had adequate time to do so. See *Davis*, 418 F.3d at 312. Any tension among non-binding district court decisions, without any split among federal appellate courts, is not grounds for certiorari review.

C. The Three Purportedly Recurring Disputes Arising From The Application Of *Garcetti* Are Not At Issue In This Case And, In Any Event, Do Not Exist.

The final part of the petition is a scattershot description of supposedly similar fact patterns producing different results, prefaced with a request that this Court do the impossible and announce a single formula "to be applied in every case where there is a question of whether an employee is speaking pursuant to an employment duty." Pet. 32. Petitioner groups his cases under three headings: (1) statements made by employees in public hearings that are related to the scope of employment; (2) compelled testimony; and (3) memoranda pertaining to job duties. *Id.* at 31-37. What petitioner fails to consider, however, is that his case does not implicate any of these three areas. Nor is there any dispute over the governing legal principles in any of them.

1. The first purported source of confusion surrounds statements by employees in public hearings relating to their employment. *Id.* at 32-33. For this, petitioner relies on *Lindsey v. City of Orrick, Missouri,* 491 F.3d 892 (8th Cir. 2007), and *Caraccilo v. Village of Seneca Falls, N.Y.,* 582 F. Supp. 2d 390 (W.D.N.Y. 2008). In *Lindsey,* a municipal employee voiced concerns over possible violations of Missouri's open meetings law during city council meetings. See 491 F.3d at 896. And the village employee in *Caraccilo* complained during a village public safety meeting that New York's open meetings law required that minutes of the meeting be recorded. See 582 F. Supp. 2d at 408.

But petitioner does not seek First Amendment protection for statements made at a public hearing or meeting. The statements for which he alleges retaliation were his private April 22 and May 8, 2003 communications with DII officials. Appellee's Br. 18-19. And his January 9, 2003 statement was made at a meeting of ISP investigators convened to discuss a possible response to an inquiry from the governor's office regarding the Steidl and Whitlock murder convictions, *ibid.* This meeting was attended only by ISP employees, Tr. 1131-1132, and involved a discussion of an ongoing ISP investigation, which necessarily was closed to the public. Because this case does not involve any statements made at a public hearing or meeting, petitioner's first identified dispute does not warrant this Court's review.

2. Petitioner's second issue is immaterial for the same reason. He describes three cases involving application of First Amendment protections to compelled testimony. Pet. 33-34. Respectively, the cases involve a police officer's testimony at the criminal trial of a fellow officer, a police officer's subpoenaed deposition testimony in a civil suit, and a jailer's testimony at an emergency hearing regarding unsafe conditions at a county jail. See *Reilly,* 532 F.3d at 224-228; *Morales v. Jones,* 494 F.3d 590, 598 (7th Cir. 2007); *Green v. Barrett,* 226 Fed. Appx. 883, 886 (11th Cir. 2007). Contrary to petitioner's vague assertion, there are no "direct parallels between" the compelled testimony in these cases and petitioner's statements at the January 9, 2003 meeting, Pet. 35, which was convened to discuss the Steidl and Whitlock convictions internally. Petitioner was not subpoenaed to attend the meeting and did not testify under oath. He attended the meeting at his supervisor's direction.

3. Finally, petitioner does not seek First Amendment protections for a memorandum, so petitioner's remaining cases are irrelevant. Petitioner alleges retaliation based on three oral statements: (1) his presentation at the January 9, 2003 meeting; (2) his April 22, 2003 conversation with an official from DII; and (3) his May 8, 2003 conversation with DII. So even if there were confusion over how to treat an employee's memorandum under *Garcetti* (and there is not, see *supra* pp. 19-23), this case simply does not present that issue.

4. In fact, there is no genuine confusion in any of the areas that petitioner highlights. What petitioner identifies are mere factual differences yielding differences in outcome, consistent with this Court's admonishment in *Garcetti* that any inquiry into the scope of an employee's duties is a "practical one." 547 U.S. at 424.

For example, in claiming a "circuit" split between *Lindsey* (an Eighth Circuit decision) and *Caraccilo* (a district court decision) over statements made in public hearings, petitioner overlooks the obvious factual differences between those cases. In *Lindsey*, the plaintiff's speech about possible violations of the open meetings law was protected by the First Amendment because "there [was] no evidence Lindsey's job duties even arguably included sunshine law compliance." 491 F.3d at 898. In contrast, the employee who spoke up about open meetings compliance in *Caraccilo* "believed that it was her duty to take minutes of the meeting," so the court unsurprisingly held that her communications were made as a public employee, not as a private citizen. See 582 F. Supp. 2d at 411.

Petitioner's compelled testimony cases are just as easily reconciled. According to petitioner, the Third Circuit's decision in *Reilly* and the Seventh Circuit's decision in *Morales* are inconsistent with the Eleventh Circuit's unpublished opinion in *Green*. But the speech in *Green* differed significantly from the criminal trial testimony in *Reilly* and the subpoenaed deposition testimony in *Morales*. *Green* involved an

emergency hearing called by the county sheriff to consider whether a particular inmate should be transferred from the county jail to a maximum security state prison due to safety concerns. See 226 Fed. Appx. at 884. The chief jailer testified regarding the jail's unsafe conditions and was subsequently fired. *Ibid.* In sharp contrast to *Reilly* and *Morales*, where employees provided testimony that was clearly outside of their job duties:

> Green [did] not dispute that she testified at the hearing because she was the Chief Jailer, the public employee responsible for the conditions at the jail. Nor [did] she contend that the purpose of her statements was to communicate to the public her concerns about the general safety of the Fulton County Jail or the necessity for change in the conditions of the jail. Rather, her statements were made in a hearing conducted for the specific purpose of assessing whether the jail was a safe place for inmate Al-Amin to be housed. On these facts, Green's testimony was given pursuant to her official duties as Chief Jailer.

Id. at 886. Again, these decisions reflect no legal inconsistency, just the application of settled law to different facts. And in any event, the only Seventh Circuit decision that petitioner cites, *Morales*, held that the employee speech in that case was protected, and therefore (even if petitioner's case had involved coerced testimony) petitioner could not claim that the Seventh Circuit's rule somehow prejudiced him.

Finally, the fact that courts in different cases involving written speech reached different results is neither surprising nor evidence of a split over the proper legal rule. As with petitioner's other authority, the varying outcomes in these cases stem from factual differences. For example, petitioner contrasts the Ninth Circuit's decision in *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121 (9th Cir. 2008), with *Haynes v. City of Circleville, Ohio*, 474 F.3d 357 (6th Cir. 2007). But again these cases presented very different facts. Posey was a high school security specialist who wrote to district officials with both personal grievances and complaints about inadequate safety and security policies at the school. See 546 F.3d at 1123-1124. Because the parties specifically disputed whether the plaintiff had any policy-making responsibility or authority, the Ninth Circuit remanded the case to the district court for additional fact-finding on this question. See 546 F.3d at 1123-1130. In contrast, Haynes, a police canine handler, wrote to the chief of police complaining that reductions in canine training time would likely raise an imminent risk of physical harm. See 474 F.3d at 359-360. Unlike Posey's letter, which was sent to several school district officials, see 546 F.3d at 1124, Haynes wrote solely to his supervisor, see 474 F.3d at 360. Nor was there any dispute that Haynes' letter addressed precisely his employment duties – administration of the canine training unit. See *id.* at 364. As the Sixth Circuit noted, "Haynes had developed the standard operating procedure for the canine unit and worked with his dog as part of his day-to-day professional

activities." *Ibid.* Thus, his writing "as a whole is best characterized as that of a disgruntled employee upset that his professional suggestions were not followed as they had been in the past." *Ibid.* It was not so obvious that Posey's letter related to his job duties, which had been substantially reduced before he wrote it. See 546 F.3d at 1124-1125.

5. As explained, the lower courts are not split over the proper application of *Garcetti*. But even if they were, more time is needed to allow the relevant issues to percolate in the courts of appeal. Petitioner argues that *Garcetti* failed to articulate a comprehensive standard for determining the scope of an employee's job duties in the First Amendment context. Pet. 3. According to petitioner, this has "created confusion amongst the lower courts and has resulted in inconsistent decisions and inconsistent applications of principles espoused by this Court in *Garcetti*." *Id.* at 3-5. In support, petitioner cites a long list of district court cases. *Id.* at 4-5 n.1. As discussed, however, see *supra* pp. 20-21, there is no circuit split over how to determine an employee's job duties for First Amendment purposes; rather, the differences in the post-*Garcetti* cases stem from factual differences, not legal disagreements. Nor do the courts of appeal identify any "confusion" over how to apply *Garcetti*. In fact, many indicate just the opposite. See, *e.g.*, *Davis*, 518 F.3d at 313 ("Cases from other circuits are consistent in holding when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is

undertaken in the course of performing his job"); *Brammer-Hoelter v. Twin Peaks*, 492 F.3d 1192, 1203 (10th Cir. 2007) ("Cases interpreting *Garcetti* have made clear that speech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation."); *Wilburn v. Robinson*, 480 F.3d 1140, 1150 (D.C. Cir. 2007) ("In the wake of *Garcetti,* courts of appeal have denied First Amendment protection to government employee speech if the contested speech falls within the scope of the employee's uncontested job responsibilities"); *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1331 (10th Cir. 2007) (noting that "[o]ther cases to emerge after *Garcetti* confirm our conclusion").

In any event, this Court's review at this time would be premature. *Garcetti* is only two years old. Thus, to the extent that true legal disagreements were to arise, the lower courts have not had sufficient time to resolve them. See *Davis*, 518 F.3d at 312 ("Because *Garcetti* is a recent decision, lower courts have had limited opportunity to interpret it."). Petitioner's heavy reliance on district court and unpublished decisions, rather than published appellate court decisions, illustrates this point. Twenty-four of the 64 cases cited in the petition are district court or unpublished decisions.

Notably, this Court has denied petitions for writs of certiorari in nine other cases involving the application of *Garcetti*. See *Reilly v. City of Atlantic City*, 532 F.3d 216 (3d Cir. 2008), cert. denied sub nom., *Flipping v. Reilly*, ___ S. Ct. ___, 2009 WL

425096 (2009); *Nixon v. City of Houston, Texas,* 511 F.3d 494 (5th Cir. 2007), cert. denied, 128 S. Ct. 2504 (2008); *Vose v. Kliment,* 506 F.3d 565 (7th Cir. 2007), cert. denied, 128 S. Ct. 2500 (2008); *Morales v. Jones,* 494 F.3d 590 (7th Cir. 2007), cert. denied, 128 S. Ct. 931 (2008); *Spiegla v. Hull,* 481 F.3d 961 (7th Cir.), cert. denied, 128 S. Ct. 441 (2007); *Haynes v. City of Circleville, Ohio,* 474 F.3d 357 (6th Cir.), cert. denied, 128 S. Ct. 538 (2007); *Green v. Barrett,* 226 Fed. Appx. 883 (11th Cir.), cert. denied, 128 S. Ct. 439 (2007); *Freitag v. Ayers,* 468 F.3d 528 (9th Cir. 2006), cert. denied, 549 U.S. 1323 (2007); *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006), cert. denied, 128 S. Ct. 119 (2007). Between these petitions for writs of certiorari and petitioner's, no new developments have arisen requiring this Court's review. And if this Court were inclined to grant a petition to address *Garcetti*'s application, this case would be the wrong vehicle. This case involves a simple application of *Garcetti* to undisputed facts, including petitioner's repeated admissions that he took his complaints to DII pursuant to his job duties.

CONCLUSION

The petition for writ of certiorari should be denied.

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In The

Supreme Court of the United States

MICHALE CALLAHAN,

Petitioner,

v.

STEVEN M. FERMON AND DIANE CARPER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Seventh Circuit

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I. Callahan, unlike the plaintiff in *Garcetti v. Ceballos,* has not acknowledged that his speech was made "pursuant to" his employment duties.

The Respondents' principle argument in this proceeding is that Callahan has conceded that his speech was made pursuant to his job duties. As such, they contend that this case mirrors the question presented to the Court in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). According to them, in each case it was undisputed that the employee's speech was made pursuant to his job duties. Ironically, before the District Court the Respondents argued that Callahan was not acting according to his job duties and that he was engaged in a rogue unauthorized investigation of his boss.[1]

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[1] During the course of the trial, which took place a year prior to the decision in *Garcetti*, the Respondents argued that Callahan's speech did not arise out of the performance of his normal job duties. In fact, the Director of the ISP testified that an ISP officer could not, as a permitted part of his job, investigate a superior officer. [Tr. 251]. During the course of closing arguments the Respondents argued at trial that Callahan had gone to DII "on a personal grievance, personal vendetta against Captain Fermon." [Tr. 1890]. In their opening brief to the Seventh Circuit the Respondents' acknowledged that Callahan's conduct was not in furtherance of his job assignment because his complaints to DII stemmed from an unauthorized investigation. [See p. 20-21 of Respondents' brief to the Seventh Circuit]. In fact, even the Seventh Circuit concluded that Callahan had engaged in a "surreptitious investigation of Cpt. Fermon." App.4.

Recently, the Fourth Circuit, in *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009), recognized that, to the extent, a memorandum

(Continued on following page)

Callahan's statements and the statements of his counsel upon which the Respondents rely to buttress their argument, only express his belief that as a sworn officer of the Illinois State Police ["ISP"] he was obliged to report misconduct. Unlike the situation in *Garcetti*, the Petitioner's speech was not made by him in performing an assigned job duty and he has never stated to the contrary.

On April 22, 2003, Callahan contacted the Director of ISP's Division of Internal Investigation ["DII"] and reported to him concerns that his supervisor, Captain Steven Fermon, might be involved in misconduct involving organized crime and may have interfered with a federal criminal investigation. [Tr. 557-559, 561; 1249-1252]. Callahan had reservations about going to DII, but after conferring with both an FBI agent and a former supervisor, he felt as though it was the appropriate thing to do. [Tr. 1272-1273 and 1277]. On May 22, 2003, Callahan met with DII representatives and shared, in detail, his concerns about Fermon. He also complained that Fermon's boss, Colonel Diane Carper, had repeatedly made comments that the Rhodes homicides were "too politically sensitive" and thus could not be investigated.[2]

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authored by a police officer and sent to a police commissioner complaining that a shooting may not be justified, was unauthorized. *Garcetti* would not strip that speech of its First Amendment protection. This runs contrary to the conclusion reached by the Seventh Circuit in this case.

[2] A truly shocking statement given that many individuals within the ISP believed that there was a very good likelihood

(Continued on following page)

[Plaintiff Ex.18]. FBI officials subsequently shared Callahan's concerns about Fermon with DII representatives. [Tr. 710-714].

DII is obligated to investigate complaints of misconduct that it receives from employees of the ISP and complaints that it receives from the general

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that two innocent people were in prison and there were strong suspicions that a politically connected businessman was linked to the murders. On September 13, 2003, the Springfield, Illinois *State Journal-Register* newspaper's lead editorial weighed in on the Steidl and Whitlock matter and stated:

> This case has been mismanaged and botched every step of the way going back to the murders of Dyke and Karen Rhoads on July 6, 1986. Herb Whitlock should not have to spend another day in prison, let alone another month, year or longer as prosecutors amble their way through a protracted appeals process. **No one in Illinois should stand by as this injustice continues.**

The evidence in the record shows that it is not terribly difficult to believe that former Illinois Governor George Ryan or his office might have put pressure on the ISP in this case. For example, in the Government's evidentiary proffer filed after the indictment of George Ryan, it referenced an incident when prosecutors were talking about developing more prosecutions of SOS employees and Ryan is alleged to have responded "Fuck you, Jack, these are my guys." The assistant prosecutor stated he was stunned by the statement "that Ryan's political people were not to be touched" [Callahan Summary Judgment 45-46]. Further, according to an article in the *Chicago Tribune* in late summer 1998 George Ryan's chief legal counsel attempted to bully a then DII commander into dropping an investigation into the license for bribes scandal. As a result, the commander, Earl Hernandez, resigned from the ISP [Callahan Summary Judgment 45-46].

public. Whether a complaint is from a citizen or from another ISP employee, it is handled by DII in the same manner. [Tr. 544]. DII is charged with the responsibility of investigating not only ISP employees, but all "employees under the jurisdiction of the Governor" of the State of Illinois. 20 ILCS 2605/2605-50. According to the Director of ISP, the majority of DII's investigations are not related to ISP personnel. [Tr. 548, 550].

Under ISP's directives [PER-030], an officer who observes misconduct is required to immediately report it to his supervisor and take it through his chain of command rather than to DII. Callahan deviated from this requirement in two important respects. First, he did not report it immediately, but waited for a considerable period of time. Second, like a citizen could, he reported it directly to DII rather than through his chain of command as was required of ISP officers.

Unlike the speech of the employee in *Garcetti*, which consisted of a memorandum containing a prosecutor's recommendations for the disposition of a case he was assigned, Callahan's speech involved reporting evidence of serious misconduct by his supervisors to a governmental entity charged by law to fully investigate corruption and unlawful behavior.

In reality, the Respondents argue that a logical extension of *Garcetti* is that speech by a public employee in reporting misconduct is not protected by the First Amendment regardless of the context of the

speech if an employee, under the policies of his employer, is obliged to report it. It is a fair question whether that notion was contemplated by *Garcetti,* given that the Court stated that "[w]e reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." 547 U.S. 410. Nonetheless, this was the view essentially taken by the Seventh Circuit relying upon *Garcetti.*

Because it was conceded in *Garcetti* that the speech at issue was made pursuant to the employee's job duties, this Court had no occasion to formulate "a comprehensive framework for defining the scope of an employee's duties in case there is room for serious debate." *Id.* at 1961.

This case presents that opportunity. It allows this Court to establish the contours of when an employee is speaking pursuant to his job duties. More particularly, does an employee who reports workplace misconduct forfeit First Amendment protection merely because the employer has a banal rule requiring all employees to come forward anytime they perceive wrongdoing?

A public employee, while at work for the government, like any other citizen, can be exposed to misconduct. Hopefully, a responsible public employer would expect that its employees would come forward and report such misconduct. Responsible citizenship requires no less of a duty. Where is the line to be drawn in public employee speech in this type of

situation between speech as a citizen and speech as an employee?

It is far from clear that Callahan's "admission" that he felt obliged to report misconduct renders his statements to DII to be made "pursuant to his job duties." For example, in *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), the Ninth Circuit reasoned that even after *Garcetti* a public employee has a right to complain of misconduct to an independent state agency "regardless of his status as a public employee." Those rights were not lost merely because of the communications occurred at work or were related to the subject matter of her employment. Accordingly, if the employee had a "responsibility as a citizen to expose such official malfeasance to broader scrutiny." *Id.* at 545.

The Respondents suggest this Court's review at this time is premature because *Garcetti* is only a few years old and the lower courts have not had significant time to resolve discrepancies arising in the wake of its decision. This argument ignores the concerns expressed by numerous lower courts that *Garcetti* has provided no guidance to the frequently difficult question of when an employee is speaking pursuant to his job duties and the holding in *Garcetti* does not adequately guide them in grappling with its application to particular cases.[3]

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[3] Throughout hi initial petition, Callahan references cases throughout the country that support this point.

The time is ripe for this Court to provide guidance as to when it is that speech by a public employee loses his First Amendment protection because his speech was pursuant to his job duties. Whether speech by a public employee is considered that of an employee rather than a citizen merely because his employer has a policy or rule requiring him to come forward to report misconduct is a question of significant importance in the development of First Amendment jurisprudence. Because of this Court's holding in *Garcetti*, the Seventh Circuit has answered that question in the affirmative. It is important for this Court to clarify if this was the result intended by *Garcetti*.

II. Qualified Immunity is not a barrier to this Court's consideration of this case.

The Respondents argue that because of the present uncertainty of the correct application of *Garcetti*, they should be entitled to qualified immunity. Qualified immunity, however, attaches based upon the state of the law at the time of the constitutional deprivation. The events giving rise to this case took place on June 16, 2003, nearly three years before *Garcetti* was decided.

In June of 2003, the law of the Seventh Circuit was compatible to the position advanced by the Petitioner in this case. At that time, it had recognized that speech arising out of an employee's routine performance of his day to day job duties represented

speech of an employee and not that of a citizen. *Gonzalez v. City of Chicago*, 239 F.3d 939 (7th Cir. 2001). In this respect, the *Gonzalez* court stated:

> If Gonzalez was writing reports of police misconduct, and his supervisors told him to rewrite the reports so as not to disclose police corruption, Gonzalez would have a First Amendment right to expose the police cover up to the public. But in that circumstance, Gonzalez would be acting beyond his employment capacity. Instead of simply performing his job of writing truthful internal reports, he would be speaking out as a citizen on a matter of public concern – a police cover up. *Id.* at 941.

In *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002), the Seventh Circuit distinguished speech arising out of routine work duties from speech of the type made by Callahan. In that case, a police officer reported misconduct involving the relative of an elected official and close friend of the police chief. The defendants, relying upon *Gonzalez*, argued that his speech was not entitled to First Amendment protection because he was duty bound to report that misconduct. The *Delgado* court rejected that argument because it "sweeps much too broadly." *Id.* at 519. It noted that:

> His disclosure went far beyond some rote, routine discharge of an assigned duty, as in *Gonzalez*. Our holding in *Gonzalez* is limited to routine discharge of assigned functions, where there is no suggestion of public motivation. In the case now before the court,

> Delgado's communications with his superiors were designed not only to convey information of possible crimes, but also additional facts that were relevant to the manner and scope of any subsequent investigation. Effective police work would be hopelessly compromised if police officers could be retaliated against for communicating factual details (e.g., a supervisor's relationship to a criminal suspect) that bear on the department's ability to conduct an objective investigation. The fact that a police officer's job responsibilities may in some measure overlap with motivations of a well-meaning citizen does not change this analysis. *Id.*

The position presently urged by Callahan was clearly established by the Seventh Circuit in June of 2003. In that respect, it was clear that an employee who was not performing his routine day to day job duties and who had complained of misconduct was entitled to First Amendment protection for his speech. If this Court clarifies when speech is pursuant to one's job duties in a manner consistent with *Delgado*, it will be doing nothing more than recognizing the principle that decision recognized.

Respectfully submitted,

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